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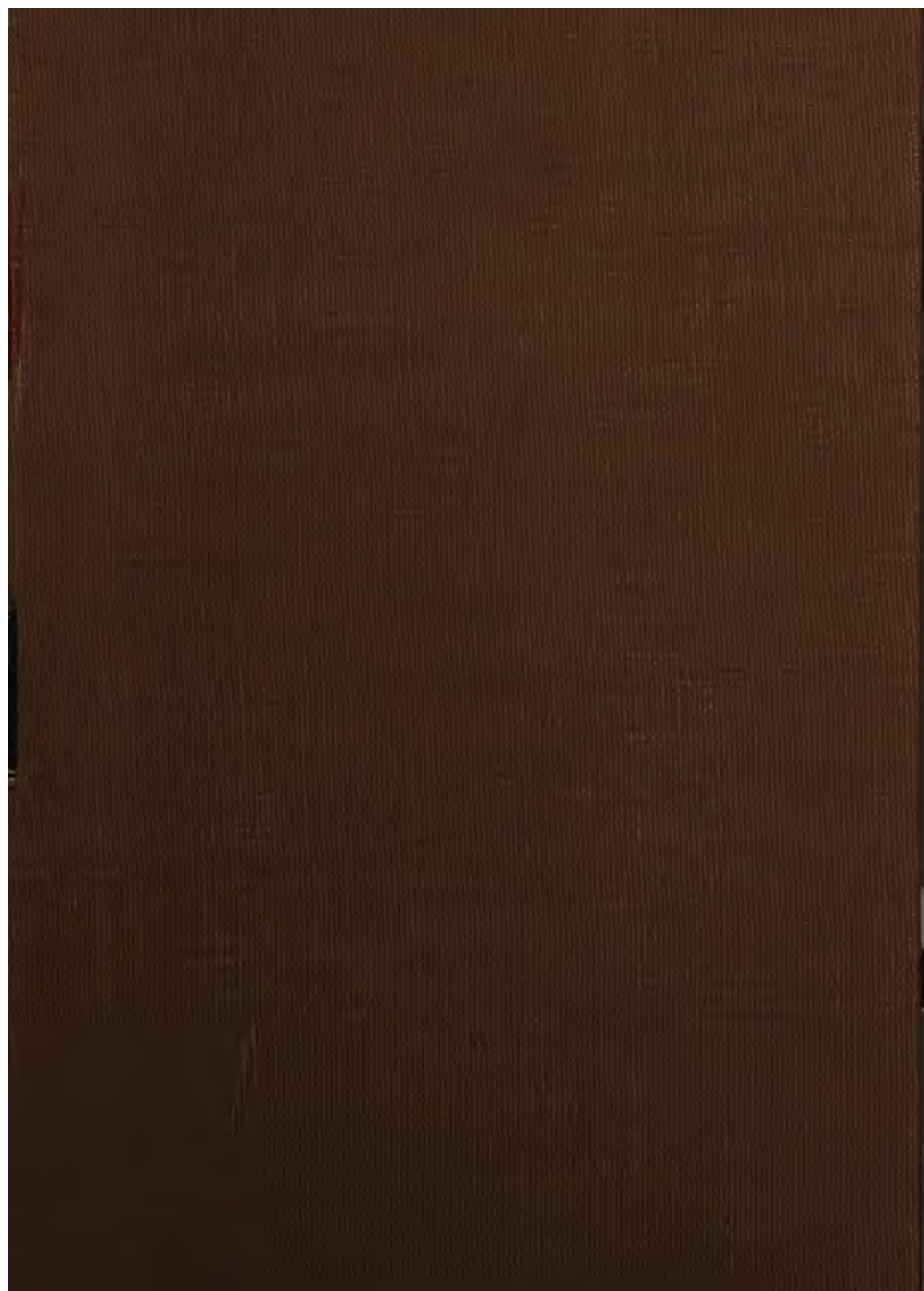
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CASES
ARGUED AND DETERMINED
IN THE 5736
SUPREME COURT
OF
NOVA SCOTIA.

REPORTED BY
BENJAMIN RUSSELL, M. A.
AND
SAMUEL A. CHESLEY, M. A.
Barristers-at-Law.

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1879.

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JUDGES OF THE SUPREME COURT

During the period of the Decisions Reported
in this Volume.

Chief Justice.

THE HONORABLE SIR WILLIAM YOUNG.
(Appointed 3rd August, 1860.)

Judge in Equity.

THE HONORABLE JOHN W. RITCHIE.
(Appointed Assistant Judge 28th September, 1870. Appointed Judge in
Equity 9th July, 1873.)

Assistant Judges.

THE HONORABLE WILLIAM FREDERICK DESBARRES.
(Appointed 14th November, 1848.)

THE HONORABLE LEWIS MORRIS WILKINS.
(Appointed 14th August, 1866.)

THE HONORABLE JONATHAN McCULLY.
(Appointed 28th September, 1870.)

THE HONORABLE HUGH McDONALD.
(Appointed 5th November, 1873.)

THE HONORABLE HENRY W. SMITH.
(Appointed 15th January, 1875.)

THE HONORABLE ALEXANDER JAMES.
(Appointed January 8th, 1877.)

Attorneys General.

THE HONORABLE OTTO S. WEEKS.
(Appointed 20th November, 1875.)

THE HONORABLE ALONZO J. WHITE.
(Appointed 18th January, 1877.)

ERRATA.

Page 24, line 2, for "no false return," read "a false return."

" 27, " 6, " " principal," " " principle."

" 34, " 7, " " T. R., Q. B.," " " L. R., Q. B."

" 119, " 9, " " page 9," " " page 93."

" 394, " 8, omit " recently."

" 444, " 29, for " his," read " their."

" 455, " 3, (from foot) for " opposing," read " supporting."

" 511, " 28 & 29, for " plaintiff," read " defendant, Wright. —"

" 533, " 1, (of report) for " defendant," read " plaintiff."

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CASES
DETERMINED BY THE
SUPREME COURT OF NOVA SCOTIA,
IN
DECEMBER TERM, A.D. 1876-7.

THE QUEEN vs. WATSON, ET AL.

Where, on the trial of prisoners indicted for breaking and entering a bank, the jury disagreed, and there was no time left for a second trial during the then Sittings of the Court, **HOLD**, that a trial could be obtained by the issue of a Commission by the Government, and that the Court could not order a new trial of the Cause or discharge the prisoners on their own recognizances.

WATSON and **Hampton** were indicted for breaking and entering the Bank of Nova Scotia, the former as principal and the latter as accessory. The case was tried before **McDONALD, J.**, at the November Sittings, 1876, and resulted in a disagreement of the jury as to the guilt of the prisoners. The trial was not concluded until about the close of the Sittings, and a motion was made before **McDONALD, J.**, for the discharge of the prisoners on their own recognizances.

Haliburton, Q. C., on the last day of the Sittings, called attention to that motion, and referred to the fact that the jury had been discharged a little earlier than usual, and that they had not been asked whether they disagreed as to both the prisoners. Had the question been asked they might possibly have agreed as to the case of one of them. The attempt to introduce the evidence of previous conviction of one of the prisoners had possibly affected the jury. Certain notices in the press had also been prejudicial to the prisoners, for which a rule *nisi* had been granted for an attachment. No punishment for these could compensate the prisoners. Among those paragraphs there were some holding out threats to Counsel that might also have had some effect upon the jury and

witnesses. The mode in which the prosecution had been pressed also entitled the prisoners to consideration. In cases of larceny the prisoners were generally discharged on their own recognizances.

Weatherbe, Q. C., read an affidavit of Hampton, with three medical certificates, showing that further confinement would be dangerous. He admitted, as a matter of course that if the Crown wished to press on the trial, the Court would be bound to try them again. One of the hardships of the case was that the Counsel for the prisoners had not been allowed the reply. The Judge had decided that the Counsel for the Crown might reply, but not the Counsel of a Corporation. The Counsel who did reply was a Counsel for the Nova Scotia Bank as admitted by himself.

McDonald, Q. C., said he had not admitted anything of the kind.

Weatherbe, Q. C., said there was an affidavit to the effect that the learned Counsel was Counsel for the Bank. A Judge in England would not allow a prosecutor for the Mint to reply.

MCDONALD, J., said the law cited referred only to cases where no witnesses were called in defence. When witnesses were called for one of two parties jointly indicted the case was the same as if witnesses were called for both.

SIR W. YOUNG, C. J., said the Court had no jurisdiction in the matter. It was one for the Judge himself and could not be reviewed unless reserved by the Judge.

Weatherbe, Q. C., contended that if there were to be a second trial it should be at once, and could be done under the statute providing for the extension or adjournment of the Sittings. It would be a great blot upon the administration of justice, if a prisoner should die in jail for want of a trial. It was in the knowledge of the Court that the Counsel for the prisoners urged an early trial, but it was deferred, (by the Bank, not by the Crown.) The Crown should be called on now to say whether it was intended to try them again. The prisoners had been prejudiced by the fact that the prosecution had been conducted by the Counsel for the Bank, who had been allowed the reply, in

contravention of the English Law and practice. Cites 4 *Foster and Finlayson*, 842, 862.

Why was it that the usual practice was not adopted, and the prisoners discharged on their own recognizances? Simply because the Counsel for the Bank intervened.

In the case of Hampton there was no proof of notice of the felony, which was requisite, as he was indicted as accessory after the fact. It must be shown that the felony was brought home to his mind and that he assisted the felon.

McDonald, Q. C., rose to reply, when Mr. Weatherbe objected as he was Counsel for the Bank, and had no right to interpose.

McDonald, Q. C., stated that he was Counsel for the Bank only in the preliminary investigation, and ceased to be Counsel for the Bank when that investigation closed. He read affidavits in support of the statement. With regard to the prisoners he stated that Mr. Shannon and he had consulted and determined that they had no right to address the Court on the matter as it was in the hands of the officials of the country.

With reference to the question asked the witness McKeen, he stated that he had asked him no question pointing to a previous conviction of Hampton.

Shannon, Q. C., for the prosecution, said that the present application should have been made to the Judge who tried the cause, and, if refused, then to the Government.

THE COURT intimated that Mr. Shannon should apply to the Government for a speedy trial.

Weatherbe, Q. C., said that the learned Queen's Counsel acting in the place of the Attorney General should take the responsibility upon himself.

SIR WILLIAM YOUNG, C. J., now (Dec. 12th, 1876,) delivered the judgment of the Court.

In this case two persons were indicted for breaking and entering a bank, the one as principal and the other as accessory. There was no verdict, the jury having disagreed. We were told on the last day of the Sittings that the state of mind of the jury was known, and that a large majority were for acquittal. Rumors of that sort amount to nothing. An affi-

davit by a juryman of what has passed in the jury room cannot be received in civil cases. *A fortiori*, it cannot be received in criminal cases. Therefore we know nothing, and ought to know nothing, of the opinions of the jurymen. Here then are two parties who have had no trial. The fact has not been found either one way or the other. Their counsel come before us and move first of all for a trial. Had the trial occupied three days instead of nine, a new trial would have followed as a matter of course, but we have no power to extend the Sittings for that purpose, and besides we have no jury. How is a trial to be obtained? By certain sections of the Provincial Act for the administration of criminal justice. The Dominion Legislature has retained unrepealed those clauses which enable the Government to issue a commission to try criminals, but this Court cannot issue it. It can give no injunction and express no desire. The Government may enjoin us and we will obey, but we cannot enjoin them. Therefore a second trial at present is beyond the functions of this Court.

Now, we are asked to discharge one or both of these prisoners upon their own recognizance. We were told that when the jury disagreed it was almost a matter of course for the Court to discharge the prisoners. I can find no authority for that position. The Court of Queen's Bench have no such authority, nor have we. No Court can enter a *nolle prosequi* or discharge upon his own recognizance a person indicted. Everybody knows that no one but the Crown Officer in England can discharge a prisoner upon a *nolle prosequi*. Attempts have been made once or twice to oblige the Court to do what the Crown Officer alone can do. The case of *The Queen v. Burnaby*, 5 Q. B., 348, differed from this in its circumstances, but is not distinct in principle. A rule *nisi* was moved for by the Attorney General to quash an indictment against a public officer and stay further proceedings. Here, in a case susceptible of doubt and discussion, the Attorney General desired the Court to do what he should do himself. "Why," said Judge WILLIAMS, "should it be cast upon the Court to stop the prosecution?" "It may be," said Judge COLERIDGE, "that many cases may arise in which public policy requires that the prosecution should be stopped. This is possible, though I cannot help saying that it must be a very strong case to require it."

For in such a case, the law has placed the power in the hands of a high officer, who, if he thinks fit, must exercise it upon his own responsibility and not throw the responsibility upon the Court."

On the authority of this and other cases I lay it down—first, that the Court cannot order or procure a new trial in this cause or any other where there is a disagreement of the jury; secondly, that they can exercise no power in any case to discharge a prisoner indicted upon his own recognizance. What is open now to the Counsel for the defendants it is not for me to say. It is in hands competent to deal with it. Let them take the course the law points out, and the Court will be ready to hear the cause whenever it comes properly before it.

KEEFE v. McLENNAN.

Enactments of the Legislature of Nova Scotia, prohibiting the retail of intoxicating liquors by unlicensed vendors, and prescribing penalties for such unlicensed vending, are within the power of that Legislature by Section 92 of the B. N. A. Act, sub-section 9; and it would be no defence to an action for such penalty to show that the legislation under which the Sessions were authorized to refuse to grant licenses was *ultra vires*. The proper course in such case would be a mandamus to the Sessions to compel the granting of the license. The legislation contained in B. S. Cap. 75, Sections 32 and 33, is not *ultra vires*, although it may to a certain limited extent affect trade and commerce.

THE Defendant was prosecuted under the provisions of Cap. 75 Revised Statutes (4th series), for retailing intoxicating liquors without license, and judgment was obtained against him for the amount of the penalty. A rule *nisi* to set the judgment aside was granted in the following terms:—

On motion it is ordered that the judgment given in this cause be set aside on the following grounds, viz.: That the Legislation of the Local Assembly of Nova Scotia regulating the sale of intoxicating liquors, as per Chapter 75 of the Revised Statutes, fourth series, and the refusal of the General Sessions of the Peace for the County of Cape Breton, last convened, to grant licenses for the sale of intoxicating liquors in said County is contrary to law, and the provisions of the British North America Act of 1867,—unless cause to the contrary be shewn within the first four days of the ensuing term of the Supreme Court at Halifax.

This rule was argued during the December term, 1875-6.

Graham, in support of the rule. The sections of the Provincial Statutes on which the Sessions refused to grant licenses are Acts of 1869, Cap. 2, and R. S., 4th series, Cap. 75, p. 343. The sections in the Revised Statutes are slightly different from those in the Act of 1869. Section 3 of the Act of 1869 imposed different penalties. Section 4 provides the mode in

which licenses are to be granted ; the same as in the Revised Statutes now, but not the same as previously existed. Section 12, of Act of 1869, repealed all previous provisions of the Revised Statutes inconsistent. The Sessions were bound to grant licenses. Chapter 75 of the Revised Statutes was a re-enactment, and as such would be unconstitutional, but it is not necessary to contend that, as the original enactment was in 1869. The Sections of the Union Act bearing upon the point are Section 91, sub-sections 2 and 3. The exclusive legislation of the Dominion Parliament includes the regulation of trade and commerce and the raising of money by all methods of taxation. The powers of the Local Legislatures are granted to them strictly, and everything that is not expressly granted to them is reserved to the Dominion Parliament. (Cites judgment of RITCHIE, C. J., of N. B., in *Queen v. Justices of Peace, Kings County*, 2 Pugsley, 525 ; 9 *Wheaton*, 229, as to definitions of "Commerce." Id. 196. The definitions are cited in *Queen v. Taylor*, Queens Bench Reports, Ontario, vol. 36, 183.)

The sale of liquor is a branch of trade and commerce. The Legislature, in passing this Act requiring two-thirds of the rate-payers to petition, virtually prohibits the sale of liquor. (Cites *Queen v. Justices of the Peace, Kings County*, 2 *Pugsley's Reports*, 525 ; 11 *Canada, L. J.*, 249, where a statute less prohibitory than the Nova Scotia Statute was held to be unconstitutional.) This view was concurred in by STRONG, J., now a Judge of the Supreme Court of Canada. The only taxing power given to the Local Legislature is to levy a direct tax.

Rigby, Q. C., contra. The question under one branch of the rule is whether the Sessions can refuse to grant licenses or not. We must assume that the Sessions looked at the law before granting or refusing licenses. We are not discussing whether the Sessions acted per force of a petition under the Act, but have they an inherent right to refuse. The legislation previous to Confederation gives them the right, even if subsequent enactments are unconstitutional. Section 129, B. N. A. Act continues in force all existing laws in the several Provinces, except as otherwise provided in the Act. Revised Statutes, 3rd Series, p. 61, gave the Sessions power to refuse

licenses in certain cases and compelled them to do so in any polling section where a majority petitioned against it. The Act of 1869 only modified that provision by making a two-thirds petition necessary for a license.

The right to regulate shop, saloon, and tavern licenses to raise a revenue for provincial, local or municipal purposes, is given to the Local Legislatures. (WILKINS, J. Section 129 of the B. N. A. Act provides that all existing Provincial laws shall continue in force unless otherwise provided by the B. N. A. Act. This case is otherwise provided for, as the Union Act gives the Dominion Parliament exclusive control of the subject of Trade and Commerce.) *Rigby, Q. C.* The case is the same as that of bankruptcy and interest. The provincial laws on those subjects remained in force until Dominion Legislation took place, although those subjects were given exclusively to the Dominion Parliament. The subject of Divorce is in the same plight. The Provincial Divorce Court is acting now under a Provincial Statute. Suppose the Provincial Legislature were to repeal the Divorce Acts, would the present Divorce Judge take any notice of the repeal? (RITCHIE, E. J., I would not be governed by any legislation of the Local Legislature, repealing or changing the existing Divorce Laws, as the Local Legislature has no present right to legislate on the subject.) The reservation in Section 129 of the B. N. A. Act applies to cases where the B. N. A. Act expressly modifies existing Provincial law, as by Section 80, where it changes the number of members in the Quebec Legislature.

THE COURT. It is a question whether the enactments of the Revised Statutes, third series, on which you rely are not repealed by the subsequent Statute.

Rigby, Q. C. The subsequent legislation if *ultra vires* cannot have any effect at all on the previous law. (RITCHIE, E. J. It is not contended that the subject matter of the law in Revised Statutes, 3rd series, is *ultra vires*, but only certain clauses in the Statute.) *Rigby, Q. C.* In so far as the repealing Statute refers to those *ultra vires* clauses it is inoperative, and they remain law under Section 129 of the B. N. A. Act.

(*Weatherbe.* The question does not turn upon the Revised Statutes, 3rd series. The rule is taken out with reference to

the Revised Statutes, 4th series which is a fresh enactment, and therefore, as we contend, unquestionably *ultra vires*.)

Graham, in reply. It is understood now that the rule is to be argued with a view to the Statutes passed since the Union. Although the Local Legislature has power over shop and tavern licenses, etc., that power is given only for the raising of a revenue. The license enactments are passed with a view of prohibiting the trade.

RITCHIE, E. J., now (December 12th, 1876,) delivered the judgment of the Court.

The defendant was prosecuted for selling intoxicating liquors in small quantities without license, and judgment was obtained against him for the penalty, when, on motion of his Counsel, a rule was granted to show cause why the judgment should not be set aside, on the ground that the legislation of the Provincial Parliament regulating the sale of intoxicating liquors, and the refusal of the General Sessions of the Peace for the County of Cape Breton to grant licenses for the sale of intoxicating liquors in that County is illegal, and contrary to the provisions of the British North America Act of 1867.

At the argument, the defendant's Counsel relied on that portion of the B. N. A. Act which conferred on the Dominion Parliament the exclusive right to legislate on the regulation of trade and commerce, of which, he contended, the legislation in question was a violation.

By the 2nd. sec. of cap. 75 of the Revised Statutes of Nova Scotia it is enacted that no intoxicating liquors shall be sold in quantities less than ten gallons, to be delivered at one and the same time, unless in the original package in which imported, such original package not to mean bottled liquors in quantities less than 10 gallons, or by license, under the penalties set forth in the Act.

By the 9th. section the Court of Sessions in the various counties are authorized to fix the amount of duty to be paid for the license; and by the 3rd. section it is provided that licenses shall only be granted by the Sessions upon the recommendation of the Grand Jury, concurred in by two-thirds of its members present, accompanied by a petition from two-thirds

of the rate-payers of the polling district in which the tavern is intended to be established, praying for such license; which petition and recommendation from the Grand Jury may be rejected in whole or in part by the Court of Sessions.

Enactments differing in no essential respect from the foregoing were in force in this Province at the time of the passing of the B. N. A. Act, and remained so under the 129th section of it, which provided that all laws in force in the several provinces should continue so notwithstanding the Union, subject, nevertheless, to be repealed or altered by the Parliament of Canada, or by the legislature of the respective provinces, according to the authority of the Parliament or of that legislature under that Act.

The Parliament of Canada has neither repealed nor altered the provincial enactments on this subject, nor passed any law inconsistent with them, and our local legislature, in revising and consolidating the statutes of the Province, has introduced these Provisions, or provisions of a like character, into the consolidated statutes passed in the year 1873, and the 4th section of the Act to provide for the publication of the consolidated statutes enacted that the Acts then in force should continue until the publication of the consolidated statutes by proclamation, after which they should be repealed and cease to have any force and effect.

It cannot reasonably be contended that the defendant was not liable to a penalty for selling intoxicating liquors in small quantities without a license because the Provincial Legislature had no right to impose such penalty, when, among the subjects over which the Provincial Legislature is given the exclusive power of legislation by the B. N. A. Act, are shop, saloon, tavern and other licenses, in order to the raising a revenue for provincial, local, or municipal purposes, and the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated as within the powers of the Local Legislature. What the defendant's Counsel relied on was, that the Local Legislature had exceeded its powers in so legislating, as that the Court of Sessions of a County could refuse to grant, or be prevented from granting licenses within the County, or any particular portions of it.

Assuming that the Local Legislature had a right to require licenses to be taken out for the sale of intoxicating liquors in small quantities and to impose a penalty on those who sold without license, but had exceeded its powers in authorizing the Court of Sessions in any event to refuse the granting of licenses throughout the County or in certain districts, it by no means follows that, though in the latter case the enactments might be void as *ultra vires*, those enactments which are strictly within its powers are to be held inoperative and void; by these the selling of intoxicating liquors without license is made illegal and the seller made liable to a penalty. The defendant is in that position, and it is no defence for him to show that the Local Legislature had no power to refuse the granting of licenses. If that were the case, and the Court of Sessions had no right to refuse licenses, as contended for, then the proper course would have been to apply to this Court for a mandamus to compel the granting of them; but such refusal would not, in my opinion, sanction or justify all persons selling without license, in violation of that legislation which is within the power of the Local Legislature.

If that Legislature had no right to enact in the last series of the Revised Statutes the provisions which it is contended are *ultra vires*, then it had no power to repeal the provisions of a like character which were in force at the time of the passing of the B. N. A. Act; for the power to repeal, as the power to enact, depends upon whether the subject matter is within the legislative powers of the Dominion or Local Parliaments. On these grounds alone I think the conviction should be sustained; but as the argument addressed to us referred mainly to the question whether the Local Legislature had exceeded its powers in legislating as it has done, it may be proper to express an opinion on that point.

It will be borne in mind that the enactment is not one whereby *all trade* in intoxicating liquor is, or can be, wholly prevented. The sole object of the Legislature was unquestionably the promotion of temperance, and the protection of the health and morals of the people, and the preservation of the peace and good order of the community, matters of police, which, but for the clause in the B. N. A. Act, conferring on

the Dominion Parliament the right to regulate trade and commerce, would have undoubtedly been within the scope of local legislation.

The section of the B. N. A. Act which confers legislative powers on the Parliament of Canada, restricts such powers to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces. The terms, "Property and civil rights," the power of dealing with which is vested in the Provincial Parliament, are very comprehensive, and on referring to the 94th and 97th sections, it is evident that the framers of the Act did not intend that they should receive a very restricted interpretation, and yet in the most restricted sense they embrace the subjects I have referred to, for life, health and personal safety are the rights of the people of every free country and to preserve them is the duty of the Legislature, and any laws which have for their object the prevention of intemperance directly affects these subjects for not only does drunkenness destroy the health and reputation, waste the property and ruin the happiness and comfort of those addicted to it, but it is the cause of most of the crimes committed in the land. It is not therefore to be wondered at that the Local Legislature should desire to pass such laws as would be likely to lessen an evil fraught with such consequences to the community, and if it cannot do this because it indirectly and to a limited extent affects one of the subjects over which the Dominion Parliament has power of legislation it must equally, and for the same reasons, be restrained from making any regulations to protect the community from the evils arising from the sale of unwholesome provisions or the unrestricted sale of poisons, which, it appears to me, it can hardly be contended it has not the power of making, and yet, whatever evils may arise from these sources they are cast in the shade by those which arise from the excessive use of intoxicating liquors, and even those enactments of our Legislature which prohibit the sale of intoxicating liquors to minors and persons adjudged to be habitual drunkards, and sales made on a Sunday, as this all affects trade, must be illegal unless deemed otherwise as police regulations. I cannot but view these and the enactment in question as such, and the Provincial Parliament is, in my opinion, entitled to legislate with a view to

regulate within the Province the sale of whatever may injuriously affect the lives, health, morals, or well-being of the community—whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with that object alone, even though to a certain limited extent it should affect trade and commerce.

In addition to what I have already said, I may remark that we are to assume that the framers of the B. N. A. Act knew of the legislation which was in force in the several Provinces, and, at the time of its passing, the law in this Province relating to the granting of licenses for the sale of intoxicating liquors, recognized the right of the Court of Sessions to refuse licenses for the sale of them in small quantities within their respective Counties, and that Act did not repeal the Provincial Law then in force, so that when the right of granting licenses was conferred on the Provincial Legislature it may very reasonably be presumed that the intention was that the right should continue to be exercised in the same manner as it was then exercised.

Authorities bearing directly on the question under consideration, are not to be met with in the English reports, but there are several decisions of the United States Courts, which bear a strong analogy to it, and those which most closely resemble it are what are termed "*The License Cases*," reported in 5 Howard, 504.

The power of regulating commerce is by the constitution of the United States vested in Congress and this power is *general and unlimited*. See *Story on the Constitution*, sec. 1066 and 1067. The ground taken in these cases was that the power, though exclusive, did not prevent the State Legislature from passing laws restricting the sale of spirituous liquors, considering them as police regulations rather than regulations of commerce. The Chief Justice, in giving judgment in one of them, said, "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness or debauchery, I see nothing in the constitution of the United States to prevent it from regulating or restricting the traffic, or from prohibiting it altogether if it thinks proper." And McLEAN, Justice, said, "In matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but

must be exercised under the changing exigencies of society. In the progress of population, wealth and civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the Legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretence of a police regulation a State cannot counteract the commercial power of Congress, and yet it has been shown, to guard the health, morals and safety of the community, the laws of the State may prohibit an importer from landing his goods, and may sometimes authorize their destruction; but this exception to the operation of the general commercial law is limited to the existing emergency. Still it is clear that a law of a State is not rendered unconstitutional by an incidental reduction of importation, and especially is this not the case when the State regulation has a salutary tendency on society and is founded on the highest moral consideration." And, again, "If a foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients fatal to the health of those who use it, its sale may be prohibited." And GRIER, Justice, referring to the public peace, health, and morals, said: "As subjects of legislation they are, from their very nature, of primary importance; they lie at the foundation of social existence. They are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance which relate to property, convenience or luxury, to recede when they come in conflict or collision. *Salus populi Suprema lex.*"

Though the decisions in these cases are not binding upon us, the opinions of the Judges of a Court of so high a character as that of the Supreme Court of the United States, are entitled to the greatest respect; and the reasoning on which their decisions are founded commends itself very much to my judgment, and is, it appears to me, as applicable to the case

before us as it was to those under their consideration ; and, in my opinion, the conviction here should be confirmed, and the rule to set it aside discharged.

RENT *v.* ADLINGTON.

Process was issued against Defendant as an absent or absconding debtor, on the usual affidavit. Application to set the process aside was supported by Defendant's affidavit setting out that he had never been out of the Province but had merely gone to Annapolis and elsewhere in the Province on business. Affidavits were read in answer showing that the members of Defendant's family, one of whom had been constituted his agent had given "unsatisfactory if not contradictory" answers to inquiries, and that the Defendant's son on one occasion had stated that his father was in Toronto, and, he expected, was then on his way home. Held that the Defendant was rightly proceeded against under the Absconding Debtors' Act.

On September 28th, 1875, the Plaintiff sued out a writ of summons and attachment against Defendant as an absent or absconding debtor endorsed by oath for \$72.63, the usual affidavit for that purpose having been made. A summons was afterwards procured from SIR W. YOUNG, C. J., calling on the Plaintiff to show cause why the proceedings should not be set aside on the ground that the Defendant was not an absconding debtor. On the return day of this summons, when the cause was heard by Mr. Justice DESBARRES, an affidavit of Defendant, setting out that he was a medical doctor, that he was not at the time of the issue of the writ an absent or absconding debtor and had no intention of absenting himself or absconding ; that he had been absent from the city at Annapolis on business, and elsewhere, but not out of the Province ; that his family had remained in town and furniture had been left there to the value of \$1600, and that he did not owe in the city over \$600. *Legg*, the Sheriff's deputy swore that he had called at Defendant's residence several times with the writ and saw Defendant's sons, who each time except the last informed him that the Defendant was in the country, stating at one time that he was in Windsor : that on the last occasion of calling the defendant's youngest son said his father was in Toronto. On the 9th of August the Defendant's son wrote to Plaintiff stating that his father was in the country, that his

mother's remittances had not come to hand, that he had orders to open letters addressed to his father, and had opened one from the plaintiff's lawyer, and was willing to accept service if need be, and the letter ended with the words, "it may be a little more trouble and expense to collect than you seem to imagine." The Plaintiff testified to repeated promises of the Defendant to pay the debt, and *Hamilton*, the Deputy Sheriff, swore that at the date of his receiving the process for execution, the Defendant's eldest son said his father was in Toronto.

Upon these affidavits, DESBARRES, J., at Chambers, pronounced the following decision, which was appealed from on the grounds that appear in the judgment below.

"The conclusion at which I have arrived, on reading the affidavit of the Defendant, and the several affidavits of the Plaintiff in answer thereto, is that the Defendant at the time of issuing of the writ of summons and writ of attachment in this suit, was absconding and liable to be proceeded against under Chap. 97, S. 1., R. S., 4th series. That Act authorizes proceedings to be taken against persons absconding or absent out of the Province, and a debtor who leaves his home and wilfully absents himself to evade the serving of legal process upon him, as it appears to me the Defendant did in this case, may, I think, be regarded as an absconding debtor, within the true intent and meaning of this Act. See *Starr v. Muncey*, Thompson's Reports, 244, and *Staples v. Taylor*, James' Reports, 320. The order *nisi* for setting aside the proceedings must, in the view I take of the law and facts, be discharged with costs to await the event, the defendant having the right to plead and relieve the property from the attachment, on putting in special bail to respond the final judgment to be given in this suit."

The following is the substance of the written argument furnished by *Wallace* for the appellant and *DesBarres* contra:—

Wallace. The defendant most positively denies that he was an absent or absconding debtor, and shows facts that corroborate his statement. He was away on business, having left his family here, and there being \$1600 value of furniture in his

house while he owed only \$600. His business in Annapolis was to purchase a farm for a permanent residence *within the Province*. The affidavit of *Legg* proves nothing at all as to absence from the Province, and simply corroborates the Defendant's statement. *Hamilton's* affidavit only proves the correctness of the return on the writ. There is not a word in his affidavit or the Plaintiff's about the Defendant absconding or concealing himself. The letter from Defendant's son is of no consequence, as the father cannot be held accountable for the flourish at the end of it which was clearly unauthorized. The Plaintiff has not even made out a *prima facie* case against the Defendant. Cites *Starr v. Muncey*, Thomson, 244. *Staples et al v. Taylor*, James, 320, *Oldright*, 709, *James*, 388.

If the Defendant was even keeping out of the way to avoid service of the process, the Plaintiff's object could have been secured by an order for constructive service as pointed out by HALIBURTON, C. J., in one of the cases cited.

DesBarres. The defendant, whose affidavit is very ingenious, does not deny that he was evading service, but merely says that he was absent a short time to buy a farm. Why not be a little more explicit? He was bound to account fully for his continued absence. The story is most improbable. Why did not the defendant permit his son to accept service of process? It is clear that he did not do so. The answers made by the members of the family to inquirers in respect to the father were evasive and contradictory, and at one time the information was given that he was in Toronto. If the Defendant was not out of the Province that statement was false, but the answer given at another time, namely that he was expected and was then on his way home, tended to show its truth.

The cases cited show that the process lies against a party absconding without being absent from the Province. See the language of HALIBURTON, C. J., in *Starr v. Muncey*. The case of *Staples v. Taylor*, is not analogous to the present. In that case the Defendant was in the city and attending to his business, and the Chief Justice held it to be a case for constructive service under the Statutes, but the language used in that case is clearly not applicable to this. The Plaintiff has clearly shown that the Defendant was absconding within what I take

to be the statutable meaning of the word, that is not necessarily that he went out of the Province, but that he went out of the city to avoid service of process. Even if absconding were held to mean being without the Province, the process should be upheld in view of the contradictory statements given in answer to inquiries, and of the fact that in some of those answers, it was stated that the Defendant was in Toronto.

The judgment of the Court, prepared by McCULLY, J., was now, (Dec. 12th, 1876,) read by SMITH, J.

This is an appeal from a Judge's order, taken under the Statute, and the Counsel agreed to furnish a written argument, which has been done.

The facts are briefly as follows: On the 28th September, 1875, the Plaintiff sued out a writ of summons and attachment against the Defendant as an absent or absconding debtor, endorsed, "by oath for \$72.63," the usual affidavit for the purpose having been made in which the Plaintiff swears that the said Defendant is absent or absconding from the Province of Nova Scotia. On the 6th October, 1875, Defendant procured a summons from the Chief Justice, at Chambers, calling upon Plaintiff to show cause why the proceedings should not be set aside, on the grounds that the Defendant was not an absent or absconding debtor, and was not liable to be sued as such, and the other grounds set forth in Defendant's affidavits. On the 12th November the cause was heard by Judge DESBARRES upon counter affidavits, and, after argument, the rule *nisi* obtained by the Defendant was discharged, costs to abide the event. A memo. in the Judge's handwriting of the grounds of his decision is attached to the order.

From this order the Defendant appealed, and it is with this appeal that the Court is now required to deal.

On the 1st October, Defendant, by an affidavit, alleges that he is a medical doctor, that he was not at the time of the issuing of the process, or before or since, "an absent or absconding debtor," nor had he any intention of absconding or absenting himself. He then admits that he had been absent from the city, at Annapolis, and elsewhere, but not out of the Province, that his business at Annapolis was about the pur-

chase of a farm, &c., &c. ; that his family remained in the city and he left furniture worth \$1600, that he does not owe in the city over \$600, and lastly he again denies that he ever had any intention of absconding.

As opposed to this, one *Charles Legg*, the Sheriff's Deputy, swears, that having the writ in the cause placed in his hands for service, he called several times, as often as five or six times, between the 15th and 29th of September, for the purpose of serving the Defendant with the process at his dwelling-house ; saw Defendant's sons, who, each time except the last, informed him that the Defendant was in the country, at one time said he was in Windsor, once was told that Defendant had been home and had gone to the country ; and, on the last occasion of calling, the Defendant's son, the youngest, said his father was in Toronto, he expected then on his way home.

On the 9th August the Defendant's son, S. Adlington, wrote the Plaintiff a letter, produced, the substance of which was, his father was in the country, his mother's remittance had not come to hand, he had orders from his father to open letters, &c. ; he had opened one from Plaintiff's lawyer, and was willing to accept service if need be, and this letter ends with a kind of threat, thus : " it may be a little more trouble and expense to collect than you seem to imagine."

The Plaintiff himself testifies as to the repeated promises of Defendant to pay, and his breach of them, &c., and lastly, *W. C. Hamilton*, the Deputy who executed the process, swears that on the day of his receiving the writ for execution, Defendant's eldest son said his father was in Toronto.

Since the case of *Starr v. Muncey*, Thomson, 244, it has been, so far as I know, a recognized and settled principle that it is not absolutely necessary that a defendant should be absent, it is enough if he abscond. The language of the statute is in the alternative, not in the conjunctive, and the case of *Staples v. Taylor*, James' Reports, 320, brings out the opinion of the Court clearly as to the construction. But the difference between the case of a man walking about the city daily and that of one in Defendant's condition needs no comment to distinguish them.

One learned Judge, after perusal of the affidavits submitted,

has decided that Defendant's conduct, his absence, the unsatisfactory if not contradictory answers of the members of his family, especially when we find them as they represent themselves as his agents, one of them at least affirming that his father was in Toronto, has arrived at the conclusion that the defendant was absconding and liable to be proceeded against under the Act. I am not prepared to say that the decision pronounced should be reversed, or that the view taken by His Lordship is not the sound and sensible one.

For these and other reasons deducible from the facts as they appear before the Court we are of opinion that this order for an appeal should be discharged with costs.

KINNEY, ASSIGNEE, v. DUDMAN.

Where the Defendant, as Sheriff, levied on certain goods under executions, and a writ of attachment in bankruptcy was afterwards issued against the execution debtor, but the Sheriff, after the issue of the attachment, proceeded to sell under the executions and paid over the proceeds to the execution creditors, the Court refused to set aside a verdict against the Sheriff, at the suit of the Assignee, for improperly selling the goods, &c., and for his failure to duly execute the writ of attachment and hand over the property of the Insolvent to the Assignee.

Held,—That the return to the writ of attachment did not estop the Plaintiff in the present suit from saying that the same had not been duly executed.

Held, also,—That a verdict for the net proceeds of the sale, with 12 per cent. added, was not excessive, the evidence justifying the finding of the Jury that the goods would have brought that amount if properly sold.

Section 59 of the Insolvent Act, 1869, is *intra vires*.

This action was brought by the Plaintiff, being the Assignee of John T. Hutchinson, an Insolvent, whose estate had been put in compulsory liquidation by a writ of attachment issued on the 15th of September, 1874. The Plaintiff sets out in his writ that the Defendant, the Sheriff of the County of Yarmouth, had levied upon certain property belonging to the Insolvent under executions against him issued previously to the writ of attachment, but that although such levy was made previously to the issue of the attachment, the goods were not sold until afterwards, and that on the 17th of September, the Defendant, having notice of the issue of the attachment, proceeded to sell and did sell the goods and paid over the proceeds to the execution creditors. The writ also contained, among

others, a count alleging that the sale had been improperly conducted by the Sheriff colluding with the execution creditors in such a way as to prejudice the interests of the Plaintiff and the creditors of Hutchinson, and that it had been proceeded with without due advertisement, in consequence of which the goods sold realized less than they would otherwise have yielded, and the declaration contained a further count setting out that the Defendant had refused to duly execute the writ of attachment and to hold in his custody, as required by the said attachment, the property of the Insolvent, but that on the contrary he had sold a large portion of the property of said Insolvent under the executions and delivered the proceeds over to the execution creditors, and refused to deliver the said goods or the proceeds thereof to the official assignee.

The fifth and sixth pleas raise the objection that the Plaintiff is estopped by the return of the Sheriff to the writ of attachment and the order of the Judge of Probate founded thereon, from saying that the writ was not duly executed or that the Sheriff committed the acts complained of by the Plaintiff, and the pleas in question set out the writ and order, with the returns of the Sheriff stating that he has attached the estate and effects of the Insolvent, and all effects, &c., found by him in his bailiwick, belonging to the Insolvent, and has put the official assignee in possession.

These pleas were demurred to, and the demurrer was argued in connection with the rule *nisi*, to set aside the verdict which was for Plaintiff.

The grounds taken for the motion to set aside the verdict, and the effect of the evidence adduced on the trial appear in the arguments of Counsel and the judgment of the Court.

Bingay, (with whom was *Weatherbe*), in support of rule. The first ground we take is, that the Assignee was not appointed at the proper meeting. The Judge's order directed the first meeting of creditors to be held on the 4th day of March, but the Assignee was appointed at a meeting held on the 11th. *Insolvent Act of 1869, sec. 27.*

If any loss or damage occurred it was during the time the Interim Assignee was in possession of the estate, and the right of Action, if any, is in him and in him only. Section 33 of

the Insolvent Act of 1869 gives the Interim Assignee the power to take necessary proceedings to preserve the estate; section 42 gives the Creditors' Assignee only the rights that vested in the Insolvent, and does not vest in him any rights that accrued between the Insolvency and the appointment of the Creditors' Assignee.

Section 59 of the Act is *ultra vires*. Civil rights, &c., are under the exclusive control of the Local Legislature.

The affidavits on which the writ of attachment in compulsory liquidation issued are insufficient. Section 20 of the Insolvent Act provides what affidavits are required. No grounds whatever are shown here for the issue of the writ.

The writ of attachment appears on its face defective. The rules of Probate Court prevail in insolvency affairs when applicable, and when not, the rules of the Supreme Court. The citation is returnable here in six days, whereas the rules of the Probate Court provide for fifteen days.

This is not the proper form of action. If there can be any recovery here at all it must be in a technical action for a false return to the writ of attachment.

Evidence was improperly admitted to contradict or alter the return of the Sheriff to the writ of attachment which was then outstanding and of record. (*Pelton*. These objections were not taken on the trial.)

There is no proof of the identity of the goods, nor is there any evidence of conversion. If the execution was put in for a part it must be put in for the whole, being a record of the Court.

Admitting that the plaintiff is right in every other respect, the damages are excessive. The Judge should have directed the jury particularly with respect to damages.

The record is not sufficient evidence of the appointment of the Assignee. It should be under seal.

Pelton, (with whom was *Meagher*), contra. As to the appointment of the Assignee, we have put in the record and every thing is to be presumed in its favor. The record is conclusive and cannot be questioned.

Broom's Legal Maxims, p. 698, 3 B. & C. 327. Section 5 of the Insolvent Act cures all irregularities antecedent to the ap-

pointment. Section 28 of the Act makes the record of the appointment a record of the Court. This answers both the first and the last objection as the record shows that the first meeting was called for the 11th. As to the affidavits on which the attachment issued, all the attaching creditor has to do is to show circumstances to warrant the issue of the writ. The discretion is vested in the Judge of Probate, and this Court cannot question it. The decision of the Judge may be appealed from, and was in this case.

The practice contended for as to fifteen days refers only to a particular matter in the Probate Court. Section 22 of the Insolvent Act makes provision for the matter. The proceedings are therefore regulated by a clause of the Insolvent Act expressly applicable to attachments.

As to the objection that only the Interim Assignee has the right to bring this action, section 42 of the Act fixes that. Section 33 only gives the Interim Assignee a right to protect the estate.

The British North America Act, Section 91, sub-section 21, gives the Dominion Legislature exclusive jurisdiction in matters of Insolvency and Bankruptcy. The objection, if good for anything, destroys the whole Insolvent Act. The reservation to the Local Legislature of "Property and civil rights," must be read as subordinate to "Bankruptcy and Insolvency," assigned to the Dominion Legislature. The same objection would apply, if valid, to Dominion Legislation on Bills of Exchange. The closing paragraph of section 91 further enacts that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of subjects reserved to the Local Legislature.

The executions and the returns show whose the goods were. The defendant cannot dispute the writ of attachment. Having acted upon it he cannot now say that it was irregular. Whether regular or irregular he was bound to execute it. *Atkinson on Sheriffs*, p. 9; 5 *Q. B.*, 394; 2 *W. Saund*, p. 193; *Stephens' Dig.*, 227; *Bullen v. Hardy*, *Ibid*; 21 *U. C. R.*, *C. P.*; *Blakely v. Hall*, cited in *McMahon on Insolvency*, 139.

As to excess of damages, they were peculiarly within the

province of the jury, and where they are not grossly excessive the jury have a right to say what they shall be. There was contradictory testimony. Even the witnesses for the Defendant say that the goods only brought 80 per cent. of what they would have brought had they been properly sold. We have nothing to do with the mode of sale. The value of the goods is the criterion. The jury have not given, as they had a right to do, twenty-five per cent. more than the goods brought, but only twelve per cent.

An estoppel to be binding must be reciprocal and unless it binds the Sheriff it cannot bind the Plaintiff. *Taylor on Evidence*, 114. *Roscoe, N. P., Evidence*, (12 Ed.,) 890. The Sheriff himself is not estopped by his return. 6 *M. & S.*, 42; 10 *Ad. & E.*, 477; *Id.*, 673. 15 *Q. B.*, 1004; 7 *L. R., Q. B.*, 175; *Miller v. Weldon*, Steph. Dig., 176; 3 *Exch.*, 526; *Ch. Arch.*, 629.

On a demurrer the party first in wrong must fail. The Defendant's fifth and sixth pleas are bad in this respect that they refer to a certain writ of attachment, but do not aver in any way that the writ of the attachment which they plead is the same referred to in the Plaintiff's declaration, and there is nothing in the plea showing it to be the same. *Stephen on Pleading*, 141.

Meagher, on the question as to estoppel, cites *Bigelow*, 562,-564. The Defendant was charged with improper conduct and collusion, and what amounted to fraud, and although present in Court on the trial he did not go into the box to contradict. The motive of the Sheriff has an important bearing on the question of excessive damages. Those judgments under which he levied were judgments by confession, one of them within a few weeks of the date of insolvency, and another a few months. The Probate Court is the only place where the fact as to Plaintiff's office as Assignee can be contested and the only remedy for an improper decision would be appeal. The book-keeper of Ryerson, Moses & Co., one of the execution creditors put up the advertisement, the Sheriff was urged to make the sale in order to defeat the anticipated attachment, and the Sheriff lent himself to that.

The returns to both writs cannot be true. The return to the

attachment must be read as not including the goods sold under the executions, and therefore there is no false return.

The party who acted as Defendant's agent says the goods would have brought one-third more if longer advertised. The Sheriff cannot claim that the amount realized at that sale conducted in that way is to be the standard of damages. The verdict is a reasonable one. It really only gives the value realized at the sale and twelve per cent., deducting the Sheriff's charges. One of the purchasers swore that he realized twelve per cent. Why might not the Assignee have realized that? The auctioneer also proves that the sale was irregular and that the goods would have brought more if properly sold.

The evidence of the Defendant, as to the sale and prices realized is all of the most general character, and is given by parties who were only present one or two hours in the course of the sale. The evidence is abundant to sanction the damages, but in any case the matter is one for the jury. *L. R.*, 2 *Q. B.*, 642; *Addison on Wrongs*, 665-667; *Mayne on Damages*, 355, 457; *R. S.*, Cap. 94, s. 232. The Plaintiffs are entitled to recover on the money counts. *8 B. & C.*, 160.

Weatherbe, in reply. The question of *ultra vires* has been raised in New Brunswick. In the case of *Bullen v. Harding*, the Chief Justice expressed his dissatisfaction with the decision. Section 59 of the Act we say is *ultra vires*, or a portion of it. Wherever the provisions of the Insolvent Act conflict with the provisions of our own Statutes in regard to matters over which the Local Legislatures have exclusive jurisdiction, there the Act is *ultra vires*.

The preamble of the Insolvent Act points to the expediency of amending and consolidating the laws relating to Insolvency in the several Provinces. The Act is of the character referred to in Section 94 of the British North America Act being legislation for the uniformity of the laws of the Provinces. Under the last mentioned section the Act should have been re-enacted in the Province to be affected by it. The intention of the Legislature was that it should be re-enacted.

It is true that sub-section 21 of Section 91 gives the Dominion Legislature exclusive jurisdiction over the subjects of

Bankruptcy and Insolvency. Under that section it is quite possible and within the power of the Dominion Legislature to pass an Insolvency law which will not interfere with the laws and rights created by Provincial Statutes in respect to subjects over which the Provincial Legislatures have exclusive jurisdiction. But the Insolvent Act of 1869 is not such an Act.

This is not the proper form of action. *Livermore v. Bayley*, 3 Mass, 487. The action should be for a false return. Had they included such a count they could have recovered. 11 Gray, 379; 9 Mass, 93; 11 Mass, 164, 165; 4 Mass, 479; 12 Gray, 95. If this verdict remains the action may still be brought for a false return. 1 Starkie, 388; 2 Dowl. 86; 1 C. & M., 772; 3 Tyrr, 906; 10 Mass, 313; *Viners Ab.*, "Return," 23; 2 Dane's Ab., 645; *Strange*, 813; 21 Pick, 189; *Hilliard on Torts*, 392.

RITCHIE, E. J., now, (Dec. 12th, 1876,) delivered the judgment of the Court:—

The Defendant, the Sheriff of Yarmouth, is sued in this action by Kinney, the Assignee of John C. Hutchinson, an Insolvent. A writ of attachment was taken out against Hutchinson on the 15th September, 1874, which was placed in the hands of the Defendant with directions to attach under it all the estate of the Insolvent, including goods which he had already levied on under certain executions against Hutchinson which had previously been placed in his hands. Though a levy had been made on the goods they were then unsold. On the 17th September the Defendant proceeded to sell all the goods and did sell them, as the Plaintiff alleges, in an improper manner, and without due advertisement, whereby they produced much less than they would have done if properly sold, and paid over the proceeds to the judgment creditors. It was contended he had a right to give the proceeds of the sale to the execution creditors as being entitled to them. Certainly that is not the case if any efficacy is to be given to the Insolvent Act of 1869. Its terms are so clear and explicit as to leave no room for argument.

The 59th section applies to just such a case, and declares:

that a creditor shall acquire no lien or privilege upon either the real or personal estate of the Insolvent for the amount of any judgment debt by the issue or delivery to the Sheriff of any writ of execution, or by levying the same, or seizing thereunder the effects or estate of the Insolvent, if, before the payment over to the Plaintiff of the monies levied, the estate of the debtor shall have been assigned or placed in compulsory liquidation under the Act, and the Defendant's counsel were forced to the contention that the passage of the Act by the Dominion Legislature was *ultra vires*, and that it had no power to render inoperative the previously existing Provincial legislation, giving to a creditor a lien on his debtor's property by the levy of his execution on it. But surely there is nothing to sustain such a contention.

An Insolvent Act must necessarily conflict with previously existing legal rights, and insolvency is a subject over which the Dominion Parliament has the exclusive power of legislation so that a Dominion statute in relation to insolvency overrides all provincial enactments.

Objections were taken to the regularity of the proceedings in the Insolvent Court as to the mode of the appointment of the assignee, the sufficiency of the affidavits on which the writ of attachment issued, and the form of the attachment. I fail to see in the evidence and documents produced that any irregularities existed, but if there had been irregularities in the proceedings in the Insolvent Court, they should have been investigated there and not here. They appear to have been regular and there has been no appeal.

Another objection much relied on, which also appears in two of the Defendant's pleas which have been demurred to and argued at the same time with the *rule nisi* to set aside the verdict, is that the Plaintiff was estopped from disputing the return of the Sheriff, and that evidence was improperly received to contradict it, and also that the action was misconceived and should have been brought for a false return. These objections are based, as I apprehend, on an entire misapprehension of the law. It is not the return of which the Plaintiff complains, but an unauthorized act of the Defendant in disregarding his rights and those of the creditors of

the Insolvent, and, notwithstanding a plain enactment to the contrary, selling the property in question in an improper manner and paying over the proceeds to parties not entitled to them. And as regards the return of the Sheriff being an estoppel in this action against him, it is a misapplication of the principal that a Sheriff's return is conclusive to apply it to a case like this. His return is only conclusive in the particular cause in which it is made. It does not operate as an estoppel in any other action against the Sheriff. It is hardly necessary to refer to cases on a point so clear. The following among others clearly establish it:—*Bridges vs. Walford*, 6 M. & S., 42; *Jackson vs. Hill*, 10 A. & E., 477; *Kennet vs. Lawrence*, 15 Q. B., 1004. See also *Taylor on Evidence*, Sec. 781.

There was an objection taken that the damages were excessive. The Jury gave the net proceeds of the sales, and added twelve per cent., and in giving their verdict for the Plaintiff they returned in writing, to questions put to them by the Court, that the Defendant arranged and conducted the sale with the design of preventing the claims of the general creditors of Hutchinson under the attachment, and with a view to favor the execution creditors at the expense of the general creditors, and that in consequence of such design and conduct the goods brought less than they otherwise would have done; and they further stated that they added twelve per cent. to the net proceeds of sale as representing the excess which might have been obtained if the sale had been otherwise conducted. And the evidence well justified the Jury in arriving at that conclusion. I see no reason therefore to disturb the verdict on that account.

The *Rule Nisi* must therefore be discharged, and the demurrer to the fifth and sixth pleas allowed.

ROTCH v. FLINN.

On appeal from the decision of the Judge at Chambers changing the venue from Halifax to Cumberland, where the statements of the Defendant as to convenience of trying the cause were in their essential features unanswered, and it was not shown that the Judge had misconceived the facts of the case, the Court refused to interfere with his discretion, and although Plaintiff's agent swore to the existence of a hostile feeling in Cumberland which would defeat the Plaintiff's claim, the Court would not presume that an impartial trial could not be had there in a matter having no general or political importance.

In this cause, which was an action of trover to recover the value of goods purchased by Defendant at Sheriff's sale,—the Plaintiff claiming under a previous chattel mortgage,—an application was made at Chambers for a change of venue from Halifax, where the action was brought, to Cumberland. McCULLY, J., made absolute the rule for a change of venue, and the cause came before the Court on appeal from his decision.

Defendant's affidavit set out that a large number of witnesses necessary for his defence, five of whom were named, resided at Wallace, in the County of Cumberland, and that the cause could be tried in that County more conveniently and with less expense both for the Plaintiff and for himself than in Halifax. The affidavit of the Attorney of Plaintiff enumerated seven persons as material witnesses on the part of the Plaintiff, who resided in the United States, and stated a belief that the evidence on both sides would be chiefly documentary. An affidavit was also made by the Plaintiff's agent covering the same ground as that of the Attorney, adding his belief that the attendance of the Plaintiff's witness would be much less expensively and more conveniently obtained in Halifax than in Amherst, and concluding that "whatever the merits of the case might be, it might almost as well be abandoned as entrusted to the chances of a trial in Cumberland, under the influences I have found to prevail there."

McDonald, Q. C., in support of the appeal. The Plaintiff's common law right to lay his venue is based on convenience. We admit that if we cannot establish a title independent of and previous to the right under which Defendant claims, we are out of Court. Therefore the witnesses, the convenience of calling whom is made by the Defendant a ground for a change of venue, are not required. His case is admitted. But we answer it by setting up a prior right under a chattel mortgage. Our affidavits show that we cannot get a fair trial. We stand in a better position in this respect in defending the venue that we selected than if we were moving on that ground to change the venue. *Harrison, C. P. A.*, 105. *15 C. B., N. S.*, 432.

The transactions on which the controversy arises occurred at Wallace. All the Defendant's witnesses are at Wallace, with the exception of the Sheriff. They would have to leave home

earlier to get to Amherst than to go to Halifax. The Plaintiff will be willing to pay the expenses of the witnesses at Halifax.

Sedgewick, contra. The Plaintiffs claim \$5000 damages. It might be necessary for us to call a great number of witnesses to reduce the damages. The cause of action having arisen in that County is sufficient ground under the old practice to warrant the changing of the venue. It cannot be questioned that the cause of action arose in Cumberland, and all our witnesses reside there. It would be more convenient for the Plaintiff's witnesses to go to Amherst than to come to Halifax. It would be infinitely easier for the Wallace witnesses to go to Amherst than to Halifax. The Court must assume that the witnesses in the County can more conveniently go to the shire town than out of the County.

The venue cannot be affected by the prospect of partiality, without an experiment.

RITCHIE, E. J. If they agree to pay all expenses of witnesses would that not remove your objection?

Sedgewick. There is no English precedent for such a course. It could only be done as a matter of agreement. The Court cannot provide for the expenses of Counsel. Besides the trial in Halifax would bring the Sheriff and other public officers away from their duties. Cites *6 Bing. N. C.*, 231.

McDonald, Q. C., in reply. The judgment of McCULLY, J., only decided that the apprehensions of the Plaintiff were not sufficient. He does not touch the question of convenience on which we rely. Admitting that the Judge exercised his discretion, his decision is subject to appeal. We stand here exactly in the same position as if we were discussing the order *nisi*. The Defendants are assailing our common law right to try our cause where we please, and the burden rests upon them. I have shown that the balance of convenience is in favor of Halifax.

SMITH, J., now, (December 12th, 1876,) delivered the judgment of the Court:—

This is an appeal from the decision of Mr. Justice McCULLY,

at Chambers, making absolute a rule *nisi* obtained to change the venue in this cause from the County of Halifax to the County of Cumberland. It is an action of trover brought to recover the value of certain goods and chattels purchased by the Defendant at Sheriff's sale, and which were sold by that officer under execution at Wallace, in the County of Cumberland. The plaintiff claims the articles under a chattel mortgage, as a subsisting prior incumbrance, for a considerable amount. The venue is laid in Halifax, and the grounds taken by Defendant in his rule *nisi* to change it are as follows:—

First: That the cause of action, if any, arose in the County of Cumberland, and not in the County of Halifax; *Secondly*: That the cause can be more conveniently and less expensively tried in the County of Cumberland; *Thirdly*: That all the Defendant's and probably most of the Plaintiff's witnesses reside in the said County; Other grounds are disclosed in the affidavits on the part of the Defendants.

The Defendant sets out in his affidavit that he has a large number of witnesses necessary to be subpoenaed to substantiate his defence, five of whom he names, who, together "with others," reside at Wallace, in said County of Cumberland, and he further states, "that the said cause can be more conveniently, and with less expense tried at Amherst in the County of Cumberland, both for the Plaintiff and myself."

The affidavit of *Mr. B. G. Gray*, the Attorney of the Plaintiff, enumerates and names seven persons who are material and necessary witnesses on the part of the Plaintiff who, with "others," reside in the United States, and without whose testimony, as he is advised and verily believes, the Plaintiff cannot safely proceed to the trial of his cause. *Mr. Gray* also states in his affidavit that "I am advised and verily believe that the evidence on both sides of the material facts in issue in this cause will, at the trial thereof, be found to be very principally documentary." A long affidavit of *John Isles*, of Boston, the agent of the Plaintiff, also sets out, among other things, "that all the witnesses, of whom there are several on behalf of the Plaintiff, are resident out of the Province of Nova Scotia, as I am advised and verily believe, and that the attendance of such witnesses will be much less expensively and

"more conveniently obtained in Halifax than in Amherst." A number of circumstances are also detailed in said affidavit, from which the said *Isles* concludes that "whatever the merits of the case may be it might almost as well be abandoned as entrusted to the chances of a trial in the said County of Cumberland under the influences I have found to prevail there."

It appears to me that the affidavits made on behalf of the Defendant, are in their essential features, as noticed in the decision of Mr. Justice McCULLY, unanswered, and therefore we have to consider whether there is anything in the facts disclosed which would render it necessary for the Court to interfere with the learned Judge's discretion. This will not generally be done unless the Judge has misconceived the facts. *Cartwright v. Frost*, 27 L. J. Exch., 355. The case of *Schuster, et. al., v. Wheelwright*, 8 C. B., N. S., 383, cited in the judgment of this Court recently delivered in *Durkee v. Cox, et. al.*, 1 R. & C., 143, clearly recognizes this principle. I can see nothing in the facts disclosed in the affidavits, nor can I find anything in the authorities cited at the argument, which especially calls for the interposition of the Court or which would justify an interference with the discretionary power of the learned Judge; but on the contrary, concurring as I do in the view taken by him, that it would be affording a dangerous precedent and one unwarranted by the practice to assume that an impartial trial could not be had in the County of Cumberland in a matter having no general or political importance, I think we should not interfere. I am of opinion that under the English authorities, and the judgment of this Court in *Durkee v. Cox* already referred to, the appeal must be dismissed.

SHEPHERD v. WHITE.

PLAINTIFF was the Collector of Pew Rents in St. Paul's Church, and it was his duty as such to hand them over to the Defendant who was the Senior Warden. The Church had been broken open, and the moneys and money boxes with certain books of no use to any one but the Plaintiff and the Church, taken away. The Defendant in presence of the Plaintiff's surety, (a Vestryman), two other Vestrymen and the Rector of the Church, charged Plaintiff with the crime, adding that he had not handed over the money collected and had destroyed the books to cover the deficiency. The Jury in answer to a question said they could not

decide whether the Defendant had malice or not when the words were spoken, but that they considered he had no right to use them, and they found for the Plaintiff.

Held, that the communication was privileged, and that as the Jury had not found express malice the verdict must fall.

The Plaintiff, as Vestry Clerk of St. Paul's Church, was charged with collecting the pew rents and accounting for them to the Defendant, the Senior Church Warden. The Church had been broken open, the moneys and money box stolen, and books which were of no value to anybody but the Plaintiff and the Church taken away. Under these circumstances the Defendant, in presence of the Rector of the Church, *Jennings*, the surety of the Plaintiff, who was a vesteyman, and of two other vestrymen, charged the Plaintiff with having committed the crime, adding that he had not handed over the moneys collected, but had destroyed the books to cover the deficiency. *Jennings* said that he would pay the deficiency, and the Defendant said that if that were done he would not prosecute the Plaintiff, but would hush the affair up, provided the deficiency was acknowledged and the large book accounted for.

This action was brought by Plaintiff to recover damages from the Defendant for having spoken the words used in presence of the persons named, and the Judge instructed the Jury to find for the Defendant on the ground that the communication was privileged, and asked them to find specially whether the Defendant had or had not malice when he made the publication of the words complained of. The Jury said that they could not decide whether the defendant had or had not malice, but that they considered he had no right to use the words, and they found a verdict for Plaintiff for two hundred dollars. A rule to set this verdict aside was argued in the December Term, 1876-7.

Lynch, Q. C., in support of the rule:—There was no publication of the matter complained of. It has been brought before no person but those distinctly interested in it. The only parties present on the three several occasions were the Rector the two Church Wardens and Vestrymen, the Plaintiff himself, and *Lester Jennings*, of whose house he was an occupant, and who was a security in writing for any deficit in the Plaintiff's accounts. If it has obtained any notoriety it was not through the Defendant, who was anxious to hush it up, but by

those who brought the matter before the Court. The Defendant was the Senior Church Warden and it was his special duty to look after all the affairs of the Church, and keep an eye upon subordinates. It was therefore not only his privilege but his duty to enquire into this matter. He did not bruit it about the street corners, but gathered the officials of the Church together and the only outside person was *Jennings*, the surety. He was bound to make known the fact that had come to his knowledge that the Plaintiff was a defaulter. The cases in support of this contention are legion. On the point that the communication was privileged and also that no malice was proved, see 2 *Q. B.*, 569; 1 *Ex.* 743; 1 *Camp.*, 267; 5 *El. & Bl.*, 344; 1 *C. M. & R.*, 181.

I enunciate as the result of those cases the proposition that in every case where a party has *bona fide*, with the intention of doing right, communicated a matter to those interested, unless malice is expressly proved, the words will not be actionable.

No malice has been proved here. On the contrary the absence of malice has been expressly proved, and the Jury have so found.

Rigby, Q. C., contra. The learned Counsel for the Defendant takes inconsistent grounds. He says that Mr. White wished to hush this matter up and also that it was his duty to publish it. If this was a privileged communication, we are bound to prove malice expressly. But if it was unprivileged then malice must be inferred. It cannot be contended that there was no publication; and the whole question is, was this or was it not a privileged communication? If I show that the communication was not made *bona fide*, that takes away the privilege. I hold that the communication was not *bona fide*. The Judge told the Jury that the communication was privileged, and the Jury said they could not determine whether the communication was made with malice or not, but thought the Defendant had no right to make the statement. They therefore found that the communication was not *bona fide*.

The Defendant, believing that the Plaintiff was guilty of a robbery, offered to condone it upon certain conditions. We cannot say that he was discharging a public duty while con-

doning a felony. The occasion was not a privileged one, because the object was not a lawful object. Cites *2 Bing. N. C.*, 457; *4 Bing.*, 395; *Taylor on Evidence*, p. 52; *4 B. & C.*, 12 *Q. B.*, 511; *12 M. & W.*, 507; *Addison on Torts*, 769; *13 C. B.*, 845; *2 C. B.*, 584.

Lynch, Q. C., in reply. Cites *Lawless v. Anglo-Egyptian Cotton Co.*, 4 *T. R.*, *Q. B.*, 262. We are not here to try whether a party is justified in condoning an offence. The argument on that point proves nothing if it does not show malice. But the facts referred to in that connection do not prove malice. The facts prove on the contrary that he could not have been actuated by malice.

MCDONALD, J., now (December 12th, 1876,) delivered the judgment of the Court :—

The Plaintiff was Vestry Clerk of St. Paul's Church, and Defendant, Senior Church Warden. Two witnesses were examined, one *Lester Jennings*, a brother-in-law of the Plaintiff, who was his surety, and was also a parishioner. The other witness was *Mr. Dunbar*, who was a vestry-man. It was the Plaintiff's duty to collect the pew-rents and hand the money to the Defendant. The defamatory words complained of were spoken in the presence of the witnesses, of the Rev. Mr. Hill and of Mr. Pryor, a vestry-man, all of whom occupied responsible positions in the Church. It appears by the evidence that the Church had been broken open, the money box and money stolen, and the books, which were valueless to anybody but the Plaintiff and the Church, taken away. The Defendant charged the Plaintiff in the presence of the gentlemen named, with having committed the crime, adding that he had not handed over the moneys collected, but had destroyed the books "to cover the deficiency." The witness, *Jennings*, when the charge was made, told the Defendant that he "would pay all the deficiency," whereupon the Defendant said that if *Jennings* would do that he would not prosecute the Plaintiff, if he would acknowledge the deficiency and account for the large book, and that they would then hush the affair up. It appears also that the witness, *Jennings*, wished to call a meeting to give the Plaintiff an opportunity of proving his innocence, but the Defendant said it was no use to have such a meeting. Mr.

Dunbar says that the Defendant appointed the Plaintiff to the office, that at the time of the first meeting the Defendant was Senior Church Warden, and transacted all the business, and that what he said at the last meeting was said in the capacity of Church Warden, to him, Mr. *Dunbar*, in his capacity of vestry-man. And Mr. *Jennings* in his evidence says, "the parties were all there, I should suppose, to guard the interests of the Church." The learned Judge who tried the cause instructed the jury to find in favor of the Defendant upon the ground that the communication was privileged, and asked them to find, specially, whether or not the Defendant spoke the words in good faith or from express malice. They said they could not decide "whether the Defendant had or, had not malice when he made the publication of the words but considered that he had no right to use them;" and they found a verdict for the Plaintiff, damages \$200.

It is quite clear that this was a privileged communication, for which no action would lie in the absence of express malice, and the answer of the jury to the question submitted seems to me to settle this case. Privileged as the occasion was to use the words complained of in good faith and for honest purposes it might nevertheless be taken advantage of to indulge personal malice, but it is only in such case that the Plaintiff could succeed, and the jury not having found express malice the verdict is without foundation and must fall. In *Blackburne v. Blackburne*, 4 Bing. 395, a verdict for the Plaintiff was upheld, though the jury found that there was not express malice, but it was upheld because the Court held that the libel was not a privileged communication, but a foul and unjustifiable libel in the publication of which the law implied malice. The learned Counsel who argued this for the Plaintiff cited *Hooper v. Truscott*, 2 Bing. N. C., 457, to show that, as there was a proposal to hush up the matter upon paying the money and returning the books the communication was not privileged, and that there was express malice; but I fail to see any analogy between the two cases. In that case the Defendant approached parties who had no interest in the subject matter, though they were related to the Plaintiff. Here the conversation was between parties all of whom were deeply interested, whether the question be regarded from a religious or pecuniary

point of view. The proposal to refund the money was made, not, as in the case cited, by the Defendant, but by the witness *Jennings*, who was the Plaintiff's surety, and expressed but a willingness to discharge a legal obligation if the Plaintiff had not done his duty. It is true the Defendant said that he would then have the matter hushed up, but if the communication, when made at an antecedent time, was made in good faith, the case clearly comes within the law laid down in *Harrison v. Bush*, 5 E. & B., 344, where it was held that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminary matter which without this privilege would be slanderous and actionable. Here the words of Lord Campbell, used in that case, are very appropriate, when he says: "In the present case little need be said to show that the communicator had both an *interest* and a *duty* in the subject matter of the communication." The jury did not find express malice in this case, and, if they did, I do not see that there is evidence to support such a finding. The verdict therefore must be set aside.

HAZELL v. DYAS.

WHERE the Plaintiff, the widow of J. Hazell, suing on a bond for maintenance made to her late husband and herself, testified that she had the bond in possession after her husband's death, that she gave it to her son to be recorded and had not seen it since, and the son testified that he had sent it by the magistrate to get it recorded and had not since seen it, and the document was traced to the office of the Registrar of Deeds, who testified that some one supposed to be entitled to it had got it out of his possession, and that he had searched in his office in vain for it; a paper sworn by the Registrar to be an accurate copy of the Registry was admitted as secondary evidence. *Held*, that the evidence was properly received.

The bond contained the usual attestation clause as to signature and sealing, and Defendant had acknowledged several times that he had executed a bond to J. H., but Plaintiff's son said he did not think the original, which he saw, was sealed. The copy from the Registry contained no indications of a seal, and the Defendant (whose evidence on some essential points was inconsistent with that of Plaintiff's witnesses, and the proven facts of the case) denied that he had ever delivered a sealed bond to J. H. The question as to the sealing was left to the Jury, who found "that the document in evidence was identical in purport with that signed by the Defendant, which he denied," and they found a verdict for Plaintiff. *Held*, that the question was properly left to the Jury, and that he verdict should not be disturbed.

The sealing and delivery of a bond are put in issue by a plea that the Defendant "did not make and deliver any such bond" as that declared on.

This action was brought on a bond alleged to have been given by Alexander Dyas to Joshua Hazell and Mary Hazell, his wife, conditioned for the maintenance of the obligees, the consideration being a transfer of certain land from Joshua Hazell to the Defendant. The Defendant pleaded that he did not become bound by said bond, nor did he make and deliver any such bond, that there was no consideration but that of relationship, that he was never required to furnish maintenance, &c., as specified in the bond, and lastly he denied the alleged breach. Joshua Hazell died in 1866, and this action was brought by his widow. It appeared in evidence beyond dispute that some paper writings had been executed between the Defendant and Joshua Hazell and that Hazell and his wife had afterwards gone to live with the Defendant, and that the Plaintiff had continued to live with him until 1873, when he moved to a new house, after which, as Plaintiff alleges, the Defendant failed to discharge his obligations under the bond.

Secondary evidence of the bond was received under the following circumstances: Plaintiff testified to her having had the bond after her husband's death, that she gave it to her son, John Hazell, who told her he had sent it to be recorded, and that she had not seen it since. It was traced to the office of the Registrar of Deeds, at Parrsborough, who recorded it, and the Registrar testified that some one who he supposed had a right to it had got it from his possession, and that he had searched his office for it in vain.

The evidence as to the execution of the bond is as follows: The attestation clause declares, "I Alexander Dyas do herewith set my hand and seal," &c., and the Defendant acknowledged on several occasions that he had executed a bond to Joshua Hazell, his father-in-law; but John Hazell, the Plaintiff's son, who saw the original, said he thought the bond was not sealed, and the paper in evidence sworn to be an accurate copy taken from the book of registry contained no indication of a seal. Defendant testified that the paper he signed had no seal of office to it, that no seal had been affixed to it by him or by any person with his directions, that the paper in evidence was not a copy of any paper signed by him, and that he never delivered any sealed bond to Joshua Hazell. Other

evidence was given by the Defendant, however, that was in conflict with that of the Plaintiff's witnesses, and inconsistent with the proved facts of the case.

DESBARRES, J., who tried the cause left the question as to the sealing of the bond to the Jury, and they found that the document put in evidence was identical in purport with that signed by the Defendant, which he denied, and the verdict was for the Plaintiff.

A rule *nisi* was taken to set aside the verdict, the grounds of which appear in the argument and in the judgment of the Court.

W. A. Johnston, Q. C., in support of the rule. The bond was given in consideration of the Defendant receiving a deed of a lot of land containing a house and barn. When he received the deed he found that it did not contain the house and barn, and the contention of the Defendant is that the transaction so far as the bond was concerned fell through. The widow did not release her dower and Defendant therefore got an imperfect title.

There is no sufficient proof of search to let in secondary evidence as to the bond. We have the bond traced to the hands of the Registrar of Deeds, and it was handed to him by Mr. McNamara, who must be presumed to be alive. McNamara was not called to say whether he had received it from the Registrar or not. There is no proof of any search in Mrs. Hazell's house. The last person to whom a document is traced is the man who should make search. It cannot, however, be argued that the Registrar is the last person, because he only received it officially for a specific purpose and to be returned to McNamara. *11 C. B.*, 1035; *Roscoe's N. P. Ev.*, p. 5 (11th ed.)

There is no proof of a seal, but all the proof is the other way. The Registrar's own copy does not show a seal. There is no "L. S." nor anything to indicate a seal. We have, moreover, positive evidence of *John Hazell*, who saw the paper, that he thinks it had no seal, and of the Defendant, who swears that it had no seal. *Crowther v. Solomon*, 6 C. B., 758; 1 DeG. & S.,

evidence could be given of it, the declaration being on a bond.

There is no proof of delivery of the bond, but the contrary. It was in Defendant's possession in 1870, and there is no proof that it went out of his possession. There is no proof that the original was ever signed. Defendant says, "This is not a copy of any paper signed by me."

The bond is a joint bond and the action cannot be maintained by the survivor of the obligee.

It was a misdirection in the learned Judge to tell the jury that it was for them to decide whether there was a seal on the instrument or not. *11 M. & W.*, 483.

Rigby, Q. C., contra. A joint bond can only be sued on by the survivor. I know of no difference in this respect between a joint bond made to husband and wife and any other. *Selwyn's N. P.*, 247; *Bullen & Leake*, 471. A greater necessity would exist for the maintenance of the wife after the husband's death than before. As soon as the husband died all his interest in the bond ceased.

As to the objection of no consideration or a partial failure—urged on the ground that the obligor was to get a house, &c., which he did not get,—if the bond is a sealed instrument as we contend it was, the question of consideration does not arise.

As to the secondary evidence of the bond the Plaintiff says that after the death of the husband she had the bond, that she gave it to her son, who gave it to the Magistrate, and he to the Registrar who recorded it; and yet it is said this is not a case for secondary evidence.

On the question as to the seal on the bond, *Taylor on Evidence*, 128, shows it is a proper matter to put to the jury. *Oldright*, 201. The document is in the form of a bond, there is a condition which could not be in a simple contract, and the Defendant admits in the *in testimonium* clause that his seal was affixed.

The only plea referring to the execution of the bond is that he did not become bound, and that he did not make the bond. The only plea that puts in issue the execution of a sealed instrument is *non est factum*. "I did not make that bond," means, I did not sign it. Section 138 of the Practice

Act in effect recognizes the plea of *non est factum* as the only plea by which the execution of a sealed instrument can be put in issue. *B. & L.*, 467; 4 *M. & G.*, 801; *Oldright*, 124.

The breach is complete without any demand of support. The whole question as to the breach of the conditions was left to the jury and the jury found for the Plaintiff for very much less than the penalty of the bond. The Judge refused a rule, and the Court will, without much consideration being necessary, come to the same conclusion. *Com. Dig. Ev. B. 4; Addison on Contracts*, 1048.

Johnston, Q. C., in reply. The Judge on the trial did not take the view that there was no plea raising the question as to the sealing, because the objection was taken and the Judge admitted the evidence. The sealing is the execution of the deed. The plea "that he *did not make* the bond," puts the question in issue. The dictum cited from *Taylor* is based upon a case where there was no evidence whatever that there was no seal. Here we have positive evidence that there was no seal. *Hazell*, the son of the Plaintiff, himself says he does not think there ever was a seal. His interest was as strong as that of the wife. The presumption of a seal is cut down by three independent witnesses. *John Hazell* is one, the Defendant is another, and the instrument itself is a third. Whatever the presumption might be, it is therefore cut down by the evidence. It may be argued that the Registrar, who is himself a lawyer, spoke of it as a bond. That proves nothing. It would have been spoken of as a bond before execution at all. The calling it a bond does not make it a bond.

Secondary evidence of the instrument should not have been received. There was no sufficient evidence of a search. It is not sufficient for a witness to say, as the Plaintiff does in this case, that she does not know where the bond is. She should have been asked whether she had ever searched, and where. There is no proof of a search at all. If this verdict is sustained the precedent will be established that it is not necessary for the party who should have possession of the document to prove that he has made any search whatever, but that it is sufficient for him to simply say that he does not know where it is. *McNamara*, the Justice, was the man who was proved to have had possession of the instrument last. A search

should have been proved at his place. He was never called. The widow should have been asked whether she had ever received the bond back from the Registrar. It was to be presumed that it would be given to her by the Registrar, and a search should have been proved at her house.

On the ground that the widow cannot alone bring action on the bond, cites, 1 *W. Saunders*, 154; *Com. Dig.*, 128; *Selwyn*, 248; *Lane v. Drinkwater*; 3 *Dowl.* 233; 3 *Scott, N. S.*, 15. Cites on other points taken, 8 *C. & P.*, 271.

SMITH, J., now (Dec. 12th, 1876,) delivered the judgment of the Court:—

This was an action tried before Mr. Justice DESBARRES, during the June term, 1875, at Amherst. It was brought upon a bond alleged to have been given by the Defendant, Alexander Dyas, to Joshua Hazell and Mary Hazell, his wife, in the penal sum of \$400, conditioned for the maintenance of said obligees in the manner prescribed in said bond, viz., to provide them with "all necessary food and raiment, lodging, conveyance when required, attendance, nursing, etc., and that they the said obligees should occupy the place of abode at which they then resided, unless by some special agreement and by and with the free will and consent of the said obligees, and all comforts that they might require to be obtainable." The consideration of the said obligation is expressed therein to be the transfer, by the said Joshua Hazell, of a tract of land, "containing one hundred acres, more or less, with the dwelling and barn and all the stock and movable property." A recital in the bond sets out that the said Joshua Hazell had conveyed by deed to the Defendant the said land.

The Defendant pleaded several pleas: first, (substantially) that he did not become bound by said bond, nor did he make and deliver any such bond; secondly, that there was no consideration for the making of said bond but that of relationship; thirdly, that he was never required to furnish the lodgings, maintenance, etc., as in the Bond specified to be provided; fourthly, denial of the breach assigned.

It is beyond dispute that after the execution of some paper writings between Joshua Hazell and Defendant, Hazell and his wife lived with Defendant "in the old house," as he him-

self testifies. Joshua Hazell died 11th September, 1866, and Plaintiff continued to reside with Defendant until 1873, when he removed to his new house, since which period Plaintiff alleges he has failed to comply with the conditions of his bond, and has sold the property conveyed to him. Secondary evidence of the bond was given at the trial.

It was strongly urged by *W. Johnston, Q. C.*, at the argument in support of the rule to set aside the verdict for the Plaintiff that there was not sufficient proof of a search for the original bond to justify the learned Judge who tried the cause in permitting secondary evidence to be given of it. This objection of course strikes at the very foundation of the Plaintiff's right to retain her verdict. It is undoubtedly a clear principle of law that before secondary evidence can be given in consequence of the loss of the primary evidence it must be shown to the satisfaction of the Judge that diligent search had been made in those quarters in which the primary evidence was likely to be procured. The degree of diligence to be used in searching must necessarily depend largely on the particular circumstances of the case. Here the Plaintiff testifies to her having had the bond after her husband's death—that she gave it to her son, John Hazell, who told her he had sent it to be recorded, and swears she “has not seen it since.” It is traced to the office of the Registrar of Deeds at Parrsborough, who recorded it, and who says some one who he supposed had a right to it took it from his possession, and that he has searched his office in vain for it. *John Hazell* also proves that since he sent it by Mr. McNamara to get it recorded, he has not seen it, and does not know where it is or what has become of it. The bond having thus passed out of the hands of the Plaintiff, and been traced to a place of public deposit and searched for there, and having been shown to have been removed by some unknown person and never returned to Plaintiff, I think the learned Judge was justified in admitting secondary evidence of it.

It was also contended at the argument that not only was there no proof of a seal having been affixed to the bond but that the evidence established that there was none. This opens up in the first instance an enquiry as to the sufficiency of the Defendant's pleadings to let in such a defence. The plea under

which I presume such testimony is sought to be relied on is certainly somewhat novel in its features. It is not the ordinary plea of *non est factum*, which is recognized by the English practice as well as our own. It alleges that the Defendant "did not become bound by said bond, nor did he make and deliver any such bond." The 138th section of Chapter 94 Revised Statutes, 4th series, "Of Pleadings and Practice," provides that "in actions on specialties and covenants, the Defendant's plea that the alleged deed is not his deed shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." The form of the plea in such actions is given in the schedule to our Practice Act, and is identical with that used in England. Under such a plea, undeniably, the Plaintiff would be bound to prove the execution of the bond "in point of fact only," viz., the *sealing* and *delivery* thereof. These essential facts he must prove. The Defendant has not chosen in *language* to adopt this plea, and therefore we must ascertain whether under the 134th section of the Act referred to, he has sufficiently expressed the *substance of it*. I am not aware of any case expressly in point. The one cited at the argument, *Aveline v. Whisson*, 4 M. & G., 801, turned upon the effect of a plea denying the signing of the Deed, which raised an immaterial issue, as at Common law the signature is unnecessary. The words used by the Defendant in his first plea, "*did not make or deliver*," would seem in the absence of any Legislative enactment prohibiting their use in pleading, as certainly to deny and put in issue *substantially* the sealing of the bond without which such an instrument could not be made or rendered operative. I cannot regard the absence of a seal, or want of delivery as rendering a deed "void or voidable," as contemplated by the Statute. These are the essential elements of a specialty without which a deed is not executed "*in point of fact*."

However desirable it may be to conform as closely as possible to well-recognized and statutable forms of pleading, I think the first plea of Defendant in this case does put in issue the due execution of the bond declared on, and that in order to entitle the Plaintiff to recover it was essential that there

should have been a seal such as would satisfy this legal requirement when the bond was executed. It is to be regretted, perhaps, in view of the interests of both Plaintiff and Defendant that the original instrument was lost, as its production might have cleared up some doubts which, under the evidence, can scarcely fail to possess one's mind. It is equally unfortunate that the witness Kerr is not alive, who could in all probability have spoken with distinctness as to the execution of the bond. However, we must deal with the evidence as presented to the Court and jury.

The law is now well established that to constitute a sealing neither wax, nor wafer, nor a piece of paper, nor even an impression is necessary. In *re Sandilands*, 6 L. R., 8 C. P., 411, a recent case, this is clearly recognized. BYLES, J., there says, "The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties, and the certificate of the two special Commissioners says that the deed was produced before them, and that the married women acknowledged the same to be their respective acts and deeds. I think there was *prima facie* evidence that the deed was sealed." In the case just quoted from there was no impression. The only indication was the existence of two pieces of ribbon apparently put there for the purpose of placing a seal on them. Here there is very strong evidence that the Defendant signed the instrument—and it is called in the condition a Bond. It has the usual attestation clause in which Defendant declares, "I, Alexander Dyas, do herewith set my hand and seal, &c." He acknowledged on several occasions to Mr. Dickson that he had signed a bond to Joshua Hazell, his father-in-law. He took possession of the real estate referred to in it as a substantial consideration for the bond, and appropriated to his own use the stock upon the place. But for the testimony of John Hazell, the Plaintiff's son, and that of the Defendant, taken in connection with the copy of the document admitted in proof, and which was sworn to be an accurate copy taken from the book of Registry, and on which no indication of a seal appears, I should have had no difficulty in holding that there was *without doubt* abundant

prima facie proof of the due execution of the bond. *John Hazell* says, "it (the bond) was signed by the Defendant, but "I cannot say it had a seal on it. I think not." Defendant testifies, "the paper I signed had no seal affixed to it. No seal "was affixed to it by me or any other person by my direction. "This is not a copy of any paper signed by me," and adds, "I "never delivered any sealed bond to Joshua Hazell." If the testimony of the Defendant is to be taken as conclusive, then the *prima facie* case would be destroyed, which the circumstances would otherwise warrant, yet it is obvious that his evidence is in conflict with that given on other portions of the case by Plaintiff's witnesses. For instance, he says, "There were "no writings entered into between Joshua Hazell and myself "in March, 1866," this being the date of the paper in proof. This is utterly inconsistent with the evidence of Plaintiff, of John Hazell, of Mr. Dickson, and of the corroborating facts of the case; and, if correct, the document purporting to have been signed by him and recorded at Parrsborough must have been a forgery. How far this statement may have affected the jury it is difficult to say. I frankly confess that it creates in my mind some astonishment. But it was contended by Counsel that the learned Judge misdirected the Jury by leaving to them the question of the sealing of the bond. I cannot concur in this position. If there was no evidence of a bond *acknowledged by Defendant* given by him to Joshua Hazell, and no presumption arising in law from the facts of the case of the due execution of such an instrument, and no conflicting testimony to discredit the Defendant's evidence generally, there would be something in the contention, for the jury should then have been told there was nothing for them to decide. The jury have found that the document put in evidence was identical in purport with that signed by Defendant, which he denied. This was entirely within their province, and I think it would be going a great length upon the testimony of the Defendant, which was alone direct upon the question of the seal, under the circumstances of the case, for the Judge to withdraw from the jury the fact of the due execution of the bond.

In *Cherry v. Heming*, 4 Exch., 631, the Defendant pleaded *non est factum*. The deed was not signed and executed by himself, and, although a seal had been placed for him in the

usual way, his signature was not attached, neither was there any attesting witness to his execution. As, however, he had acted under it and recognized it as a valid instrument, the jury presumed with the approbation of the Court that he duly executed it. It will not be contended, I imagine, that it is not peculiarly within the functions of the jury to pass upon the fact under a plea of *non est factum*, of the sealing and delivery of the deed.

In *Jenkins v. Peace*, 6 M. & W., 722, Lord ABINGER, C. B., said, "To every deed two things are necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the Judges of the law; the other concerns the matters of fact, *sc.*, if it be sealed and delivered as a deed, and the trial thereof belongs to the court-try." I think the learned Judge was right in leaving, in this case, the question of the sealing to the jury, and their verdict meets with my entire concurrence.

It was also urged at the argument, in support of the rule, that the bond is a joint one, and that the surviving obligee cannot maintain an action on it. I do not apprehend this to be the law. Lord Chancellor KING, in *Coppin v. ———* 2 P. W., 497, decided that where a bond is given to husband and wife during coverture, and the husband dies, the bond will survive to the wife. Objections were also raised at the argument—that there was no proof of delivery or of signing of the bond. That a document found by the jury to possess the legal requirements of a duly executed bond was given to Joshua Hazell and wife seems indisputable. It was admitted by Defendant himself to Mr. Dickson, and he acted upon it, and, therefore, to argue that there was no delivery will hardly, I think, be persisted in. In the delivery of a deed no particular form is necessary. Throwing it on the table would be sufficient, if done with the intention that the other party should take it up. So there may be a delivery without words, or by words only, without any act of delivery. So in *Rann v. Hughes*, 7 T. R., 250, SKYNNER, C. B., in delivering judgment, laid down, "that a delivery to a third person for the use of the covenantee is sufficient if the grantor part with all control of the instrument, although the person to whom the deed was delivered be not the agent of the covenantee.

Not only is there evidence of the Defendant Dyas having signed the instrument in question, but I know of no reason why this bond should not come within the well-acknowledged principle of law that "*the signature forms no part of the execution of the deed.*" I also think the learned Judge was warranted by the evidence in leaving the breach of the condition of the bond to the jury. I am glad I have been enabled to arrive in this case at the conclusions I have, for I cannot help thinking an injustice would be done the Plaintiff were it otherwise.

The rule must be discharged with costs.

WEBBER v. COGSWELL.

A Chronometer was left by the Plaintiff with the Defendant, a Chronometer and Watch Maker and Repairer in Halifax, with instructions, as sworn to by Defendant, to put the instrument in order. Defendant, on examining it, found that it required repairs of such a nature that he was obliged to send it to Boston to have it made right. Plaintiff refused to pay the amount charged by the Boston mechanic, and on the Defendant's refusal to deliver up the instrument, brought an action of trover. On the trial Plaintiff stated that he had not ordered any repairs to be made beyond polishing, &c., for the price of which an ample tender, made before action, was proved. The jury found for Defendant, stating that they accepted his version of the instructions given when the instrument was left with him.

Held, That the Defendant had a lien for the charge made by the Boston mechanic, and was justified in refusing to deliver up the instrument until the bill was paid.

WILKINS, J., dissenting.

The Plaintiff in his writ in this action alleges that the Defendant converted to his own use or wrongfully deprived the Plaintiff of the use and possession of his goods, that is to say, one Chronometer, and also that the Defendant detained from the Plaintiff his said goods whereby the Plaintiff suffered loss and damage. The Defendant pleaded, denying the conversion and detention and the Plaintiff's property in the goods, and by his fifth plea the Defendant said that the goods had been delivered to him to be repaired in the way of his trade as Chronometer and Watch Maker and Repairer, for reward to the Defendant, and that at the time of the alleged detention the Defendant had a lien for the price of such repairs, for which lien the goods were still detained. The Plaintiff replied to this plea that he did not deliver the said goods to be repaired, but simply to be cleaned and polished and

to have a strap put thereon, and that he had tendered to and offered to pay to the Defendant Twenty-five Dollars and fifty cents in satisfaction of the alleged lien, which was sufficient to satisfy and discharge the same, and that the Plaintiff had then requested Defendant to deliver up the said goods, which the Defendant refused to do.

On the trial before WILKINS, J., at Halifax, in November, 1875, the Plaintiff stated in evidence that he had taken a Chronometer to the Defendant in November, 1874, and asked him to ascertain if it had been wet, informing him that the vessel in which it had been in use had been cast away,—that Defendant examined the Chronometer and said it was all right, and after examining it a second time said it was as bright as gold. Then, looking at the outer box, Defendant said, "this looks as if it wanted fixing up," to which Plaintiff replied that he could do that himself. Defendant said, "I'll do that for you," and Plaintiff then left the shop. In January next he received a bill from Defendant for repairing pivots and gold spring escapement, polishing rust from steel work and rating the instrument. He objected to the price and afterwards tendered to the Defendant Twenty-five Dollars and fifty cents, which Defendant refused to accept. He had never ordered any repairs to be made, and Defendant was to do nothing with the instrument but to clean the box and put on a new strap.

According to the Defendant's version of the matter, the Plaintiff on bringing the instrument to him asked him if there was any rust. He replied that he could not tell till he examined it. Plaintiff said, "You had better see to it and be as reasonable as possible." He then called the Plaintiff's attention, to the honey-combing and said the instrument had better be polished up, when Plaintiff ordered him to have it done. Plaintiff told him to put it in order and polish up the brass bands. He took the Chronometer to pieces and found the detent spring much rusted. Not one in a thousand could have made it right and he was obliged to send it to Boston to have the detent spring made right. He did not tell the Plaintiff before sending it away that he intended to do so. He had charged the Plaintiff only what he had been obliged to pay in

Boston, and he considered the Boston charge a reasonable one.

The Judge told the jury that, even accepting the defendant's statement of the instructions he had received from the plaintiff as correct, the plaintiff was entitled to recover. The defendant admitted that he had received no express authority to send the instrument to Boston, and he thought the law would not imply any such instructions. Defendant had admitted that at the time the instrument was demanded he had no claim except in respect to his disbursements to the artisan in Boston, and as the Plaintiff could not be made liable for that disbursement without his consent, express or implied, neither of which marked the case, there was no lien, and defendant had no right to detain the chronometer.

The jury found a verdict for the defendant, stating that they adopted his version of the instructions and authority received from the Plaintiff in regard to the instrument when it was left with him.

A rule *nisi* to set aside the verdict was granted by the Judge, and argued in February, 1876.

Eaton, in support of rule. In the first place there was no contract for repairs, even on defendant's testimony. Such a contract could not have been made consistently with the object which defendant states that plaintiff named when he took the chronometer to him. With regard to lien, the law gives it to the workman only for the work he does himself. *1 Parsons on Contracts*, 611. (RITCHIE, Eq. J. He makes himself responsible in sending the chronometer away. But is it not a common practice for persons undertaking to make or repair an article to send away to get certain portions of the work done?) Cites *1 Parsons on Contracts*, 617. The plaintiff's object was not to get the chronometer put into the best order, but to find out from defendant whether he was safe in taking it off the hands of the party to whom he had hired it. Cites *Addison on Wrongs*, 419, 420, 430, 438; *Story on Bailments*, Sec. 440; *15 M. & W.* 553.

Graham, contra. The party who contracts to do the repairs is the one who has the lien; the sub-contractor has none; *19 Pickering*, 299. The authority cited from *Parsons* merely

amounts to this, that the party who contracts to repair must not send the instrument out to an inferior workman.

The plaintiff contemplated having his chronometer thoroughly repaired, and the defendant would have been liable to an action if he had not got it thoroughly repaired. The jury believed the defendant's testimony which proves a contract for repairs. The jury have found that the charges were reasonable and that the tender was not sufficient. Cites 2 *Kent's Com.*, 634, 635. The lien exists whether a definite amount is charged or not. The law favors the party holding the lien. As to evidence of contract, cites 5 *M. & W.*, 192; *Addison on Contracts*, 657; 7 *Moore*, 287.

Eaton, in reply. Cites *Darks v. Richards*, 4 *M. & G.*, 574. This case overrules the case cited from *M. & W.* Cites *Fisher's Dig.* 5458. Two dollars of the defendant's demand was clearly illegal. (RITCHIE, Eq. J. The case you cite has no bearing upon this case; it refers to two *inconsistent* claims.)

DESBARRES, J. now (December 12, 1876) delivered the judgment of the Court:—

The plaintiff in this suit in the first count of the writ charges the defendant with having converted to his own use or wrongfully deprived him of the use of a chronometer belonging to him, and in the second count with the detention of a chronometer belonging to him, whereby he, the plaintiff, suffered great loss and damage by being deprived of it for a long time. The defendant, by his first plea to the first count of plaintiff's writ, says he did not convert to his own use or wrongfully deprive the plaintiff of the use and possession of said goods, and for a second plea to the same count defendant says the goods were not the plaintiff's. For a third plea to the second count defendant says he did not nor does he detain the goods as alleged, and the fourth plea to the second count is the same as the second. Lastly, for a fifth plea, being the most important of all, to the second count, defendant says that plaintiff delivered the goods to defendant for the purpose of being repaired for him by defendant in the way of his trade of a chronometer and watch maker and repairer, for reward to the defendant, and defendant received and had the goods for the purposes and on the terms aforesaid, and repaired the same,

&c., and at the time of the alleged detention had a lien upon the goods for money payable to him for repairing said goods, &c., and the money being still due and unpaid, the defendant detained the goods for a lien, &c. The plaintiff joined issue on the four first pleas, and to the fifth replied that he did not deliver the goods for the purpose of being repaired, but only for the purpose of being cleaned and polished, and having a strap put thereon. There was a verdict for defendant, and a rule having been granted to set it aside, it is now for the Court to decide whether, upon the law and evidence in the case, that verdict can or cannot be sustained. It was contended by plaintiff's Counsel at the argument, first, that plaintiff had entered into no contract with defendant for repairing his chronometer; secondly, that if there was any contract for repairing the chronometer it was a contract which required the defendant to do the work upon it himself, and that having sent it to the United States and got the work done there by another person, the defendant had no lien on the chronometer for that work.

- 1 The evidence as to the making of the contract is conflicting, and if the case had rested on plaintiff's own evidence respecting it, the defence set up would have entirely failed; but there was evidence on the other side, to which the jury appear to have attached great weight. The plaintiff says he placed his chronometer in the hands of the defendant not for the purpose of being repaired, but merely to ascertain the condition of the instrument, and whether it had been wet; that he did not ask defendant to make any repairs upon, and the defendant was to do nothing with, the instrument; that he was only to clean the box and put a leather strap on, and that \$1 would be a reasonable charge for cleaning the box and 25 cents for the strap. Now the evidence on the part of the defence as to the contract strikes my mind as being very strong, and such as was likely to make an impression on the minds of the jury. It is unreasonable to suppose that the plaintiff would take his chronometer to the defendant for the mere purpose of getting the box polished and putting the leather strap upon it, work of itself so simple as scarcely to require the aid of an artisan. The very fact of taking the instrument and leaving it in the hands of the defendant for two months warrants the inference that something more than the cleaning of the box and the

making of a leather strap was necessary and required to be done. Now the defendant states that the conversation that took place between the plaintiff and himself when the instrument was brought to him was not such as the plaintiff had expressed. He swears that the plaintiff told him to put the chronometer in order and polish up the brass bands, that he took the chronometer to pieces, and found the detent spring much rusted, a thing which he says not one person in a thousand could make right, that this could not be seen without taking the chronometer to pieces, and when he did that and saw the state it was in, he was obliged to send the instrument to Boston, to the same person that he and his predecessor before had always employed, to have the detent spring made right, that the chronometer was repaired and returned to the defendant two months before the plaintiff called for it, that defendant showed the instrument to plaintiff and told him he had sent it to the United States and put it in perfect order and was responsible for its working well for one year. On cross-examination the defendant admitted that he did not say anything to plaintiff about sending the instrument to Boston before he sent it there. *John W. Gabriel*, who was in the employ of and called as a witness for, defendant, says "the plaintiff brought a chronometer and said to defendant 'I want you to put this chronometer in order.' No agreement was made about the charge, it was not mentioned." The chronometer, he says, had been full of salt water and was not going. Defendant showed the plaintiff the salt water and the state of the instrument and told him it wanted a thorough overhauling. Witness knew it was sent to Boston. Here then are two witnesses positively swearing that the plaintiff directed the defendant to put the chronometer in order, and the fact is proved and not disputed that when sent back from Boston it was in a thorough state of repair. The charge made for the work done upon it is also proved to be a reasonable and moderate charge, and the only question is whether the defendant is warranted in resisting the payment because the work upon the chronometer was, at the instance of the defendant, done in Boston instead of Halifax, either by the defendant himself or some other person in his immediate employ. No case was cited and I have failed to find any case where in the absence of any express

stipulation to that effect, it was held that a mechanic, contracting for any specific work like this, could recover no remuneration for it, though well and skilfully done, without showing that it had actually been done by the contractor himself. The contract entered into between the parties surely did not make it imperative on the defendant to do the work with his own hands. It was simply an engagement on his part with the plaintiff to repair or cause the chronometer to be repaired and put in perfect order, and whether it was done here or in Boston appears to me to be of little consequence, provided it was well and skilfully done within a reasonable time and at a fair and moderate charge. In sending the chronometer to Boston, without the directions of the plaintiff, to be repaired, the defendant incurred a risk entirely his own, and if while on its way there or back the chronometer had been lost, the defendant would clearly have been responsible to the plaintiff for the value of it, as he is, of course, responsible for the proper performance of the work. The defendant did not make any charge for his own work here on the chronometer. He merely charges for the actual work and labor performed at his instance and through his procurement, upon the instrument, in Boston, and, as the contracting party for that work, I think he has a lien on the chronometer to that extent and is entitled to retain it until that charge be paid. It does not appear from the learned Judge's report that the plaintiff refused to pay the defendant's charge on the second ground taken by his Counsel at the argument, but that he refused to pay because he considered the charge too high, and also because he insisted that he did not request the defendant to repair the chronometer, and only required him to ascertain its condition, clean the box and put a leather strap on it. The jury, by their verdict, found that the plaintiff employed the defendant to repair the chronometer, and that the charge for the work done was not exorbitant, and as there is no evidence of any express contract and nothing in the circumstances from which it must be presumed that the defendant engaged with the plaintiff that the work should be done in Halifax and not elsewhere, I think the verdict ought to be sustained, and that the rule for setting it aside ought to be discharged with costs.

RITCHIE, E. J. The jury found a verdict for the defendant and intimated that they accepted as correct the statements of the Defendant, as to the authority and instructions which he had received from the Plaintiff, which were that the chronometer was to be put in order. It was found on taking it to pieces that the detent spring was defective, and that a new one was necessary. To supply this and to put the instrument in perfect order a more than ordinarily skilful workman was required. Not one in a thousand, it was testified, could do it, and the defendant sent the instrument to Boston to have the work done there. It was returned repaired, and the plaintiff was charged with the amount of the Boston tradesman's bill. No fault was found with the work, but it was contended on the part of the plaintiff that he was entitled to have his chronometer returned to him without his paying the bill, as he had employed the defendant to do the work and he had no right to employ another to do it without his consent.

It does not appear to me, when the instrument was left with the defendant to be repaired, that it followed that the work must necessarily be done by himself or those in his immediate employ. Though, by whomsoever the work was done, he became responsible that it should be well done, and when he discovered that the defect was such as required special skill and he felt that he could not safely entrust it to one of his own workmen, he could have recourse to a more skilful artisan either in this city or elsewhere. The cases cited by the Counsel of the plaintiff go no further than to show that a skilful workman to whom work was entrusted could not transfer it to less skilful persons. This is not like the case of a commission given to an artist, a sculptor or painter, for instance, where the party is entitled to have the work executed by the artist himself, for it cannot be contended that the defendant was bound to do this work himself and could not entrust it to a workman in his employ.

Had the instrument been lost in its transit to or from Boston, the plaintiff might reasonably have looked to the defendant to replace it, as he had adopted the risk in sending it without orders; but I see no good reason, where it has been returned repaired and in good order, for his refusing to pay for the work which he wished done to it.

If the jury had adopted the account given by the plaintiff of his instructions to the defendant the case would have been very different, as then the defendant would have incurred a much greater expense than he had authorized.

I think the rule *nisi* for a new trial should be discharged.

WILKINS, J., read the following dissenting opinion :—

The Court has not been called upon, in this case, to review *an award of arbitrators*, in order to determine whether it does substantial justice to the parties to the submission. The question before us respects the ruling of one of the Judges of this Court, at the trial of a cause, and the case is one in which the jury thought proper to disregard and find a verdict against the ruling of *the learned Judge*. Of course, I use that phrase in its conventional sense and upon the theory "that all judges are learned." It is certainly usual, in such cases, either to uphold the ruling, if in accordance with law, or if it be otherwise, to show by argument and authority that the learned Judge misconceived the law when he instructed the jury. The Judge whose ruling is in question here, has not, however, as yet heard any reference to legal principles or decided cases that even bear upon the particular view of the law as governing the issue under the evidence which he took when, in endeavoring to discharge the duty imposed on him, he thus instructed the jury. (Here the Judge read his charge.) From this it appears that, right or wrong, the jury were told that the law of the land excluded the idea of a "lien" from the case and precluded the Defendant, on his own statement of facts, from obtaining a verdict. "Did the learned Judge rightly thus declare the law?" That was in effect the sole question submitted for decision to this Court.

It would be a matter utterly unimportant if the learned Judge should himself in any case be unconvinced of his error by reasoning and authority presented to his mind by his brother judges; but it is a matter of very great importance to the suitors in the cause, and to the public interests connected with the administration of justice, that a decision pronounced by the Court adverse to the view of the law taken by the Judge at the trial, should clearly shew in what respect the

law of the case in question was erroneously stated to the jury. It is not pretended that any bad faith has marked the conduct of this defendant or that the amount of the disbursement in question made by him was unreasonable. If the jury were misdirected, they were free to find as they found. If the direction was right, that verdict was *contrary to law*, and it should be set aside.

A question of law, regarding the doctrine of "lien," lies at the root of the subject of our enquiry. Knowing the facilities which are, at last, afforded to a dissatisfied suitor, to appeal from the judgment of this Court to a higher tribunal—an accessory to our judicial system most desirable once and most valuable now—and contemplating that this case, in respect of the important principle of law involved in the decision of it, may be appealed, I am desirous that my dissenting opinion shall carry on its face an assurance to this effect, at least, that I have carefully considered it, especially, as after deliberation, I am obliged to uphold as sound, my ruling at the trial. Strange to say, *that* has not even been impugned by my learned brethren with whom I have the misfortune to differ. Their opinions seem directed to show that the verdict, on equitable principles, was right. They do not, by argument or authority, tend to show that the ruling in point of *law* was wrong. Whether the right of lien relied on by defendant exists, depends on another question, not yet noticed on this bench, namely, whether agency in the defendant, derived from the plaintiff, to use the services of a stranger to the only contract in evidence between the parties, is sustained by any evidence. This last mentioned subject of enquiry demanded and received from learned judges in Westminster Hall, in cases that I shall presently notice, careful consideration; and it would be strange, indeed, if we were at liberty to decide on the point of lien in this case without considering that subordinate question on which the decision of the primary question necessarily depends. This question, "Is there evidence to show that the plaintiff made the defendant his agent to engage and use, for the plaintiff's benefit, the work of a foreigner on the chronometer in question—that foreigner whom defendant did employ?" will present itself, and must be dealt with, before the propriety or impropriety of the ruling, and consequently the question of

right involved in the action, can be judicially determined. It is perfectly clear, that, unless that question can be, in view of the evidence, answered in the affirmative, this defendant can have no legal standing in this Court in the present case.

It is trover for conversion of a Chronometer. The defendant refused to deliver it to plaintiff, on an asserted lien, not for any personal services by him, but in respect of a disbursement made by him to an artisan, gratuitously selected by him *in Boston*, to whom he sent the instrument to be repaired. The defendant is a clock-maker in this city, where he regulates and repairs chronometers. As such, the plaintiff applied to him, in the month of November, 1874, and left with him, at his shop in Halifax, a chronometer that had been injured. There being contradictory statements between the parties as to what took place when the instrument was left, and the verdict being for defendant, I adopt his statement to the fullest extent. He said "that the plaintiff told him to put the instrument in order." He further said, that he took it to pieces and found a certain spring much rusted—an injury which, as he further stated, *but not to the plaintiff*, could not be made right by one in a thousand; that he was obliged to send the instrument to *Boston* (as he did send it,) to have that injury repaired, (as it was repaired there).

These were the facts, and the only facts given in evidence for the defendant in support of his defence. Thus, we see, the only express contract between the parties is contained in these words, "*plaintiff told defendant to put the instrument in order.*" I emphasize those words, as I shall have occasion to refer to them hereafter. Any, the least, intimation conveyed to plaintiff by defendant, in any manner whatever, that he and his servants or workmen at Halifax, were incompetent to perform any work that might be required to "put the instrument in order," or that defendant ever had in relation to any employer used any aid out of his own shop, or that it was necessary, or that he designed to send the instrument elsewhere to be repaired, in order to "put it in order," is excluded from the case by the absence of any proof. It was not pretended that defendant, before sending the instrument abroad, ever inquired of the plaintiff, whether it was his desire that the instrument should be sent anywhere out of the defendant's

shop. On the contrary, the defendant said, at the trial, "I did not say anything to plaintiff about sending the chronometer to Boston." Thus, the act of sending the instrument to Boston was, in its nature and essence, an act on the part of this defendant *purely gratuitous and voluntary*. I notice this now: the legal consequence I shall shew hereafter. We have seen what the express contract was,—“put the instrument in order.” Had that any reference in fact, or in law, to any instrumentality to be exercised in Boston? It had no reference, in the nature of things, to any work to be done under that contract to the chronometer by any other persons than the defendant and his workmen and servants at his advertized place of business in the City of Halifax. Is there anything save conjecture to support an inference that plaintiff ever *contemplated* any agency but that? But, having the honor and responsibility of administering the law, as I best may, in a British Colonial Court, I have always, until now, been under an impression that, when presiding at a civil trial, the issue placed in my hands was my guide as to what I had to try. I have been under an impression also, that a defendant can only sustain his defence, if his evidence coincide with his defensive *allegations*. This defendant was sued for conversion of the plaintiff's chronometer. In his present position he claims to sustain his verdict, *because he had a legal lien on the instrument, when demanded, in respect of a disbursement made by him to an artisan in Boston*. But what is his defensive allegation in that respect on the issue? It is in terms as follows:—(Here the Judge read the material parts of the 5th plea.*) In this plea defendant's alleged right to detain is put on the ground, (not of his, defendant's, having obtained the services of a foreigner at Boston in respect of the instrument, as *plaintiff's agent authorized to employ that foreigner*—not one word of that—but) of *defendant's services in the way of his trade of a chronometer and watch-maker and repairer, for reward to the defendant*. And it is further alleged, that defendant had a lien upon the goods for money payable to him by the plaintiff (what for? for or in respect of the disbursement? No! but) *as such reward as aforesaid*.”

* See recital of the plea in judgment of DESBARRES, J., p. 50, *ante*.

I feel that without adding a word I might rest here, convinced that I had vindicated the propriety of my directions to the jury. We have seen what the express contract was, and that it had no reference to work to be done outside the defendant's workshop. Let us now inquire, if there be any grounds for an *implied* contract, that will support a "lien"—*support it, I mean, even if it had been pleaded.* Addison says, (page 22):—"An implied contract is proved by circumstances, and the course of dealing between the parties." Again, (page 21) "The intention of the parties with regard to any particular transaction may be gathered from their acts and deeds in connexion with the surrounding circumstances?" Again, (page 1053) "*The law raises no implied promise in respect of mere gratuitous circumstances.*" (I emphasize these words with my pen and with my voice.)

Mr. BARON PARKE said, in *Higgins v. Hopkins*, 3 Exch. 166: "Whether any contract is made, or on what terms it is made, must depend on the circumstances of each case."

In the light of these tests I will ask, "What is the course of dealing?" What are "the proved circumstances?" What are the "surrounding circumstances?" What are the "acts and deeds of the parties," on which, in this case, the law can predicate the pretended contract of *this plaintiff* for the services of the foreign workman? The defendant shall give the one sole—*possible*—answer. It is this:—"The plaintiff told me to put the instrument in order." It is not within the compass of any human discernment to find any other answer in this case! It does not exist. Unless, then, the law will imply a contract from a *nonentity*, there can be no implied contract here! After stating the broad principles as set out by such a text writer as Addison, it would be superfluous to cite cases. I will, however, merely note two that will serve to show that, although the Court strove hard to raise a lien to meet the justice of the case, they decided that it could not be raised *because there was not* in the case exactly what is wanting here—*proof of agency.* They are *Buxton v. Baughan*, 6 C. & P., 674; and *Castellain et al v. Thompson et al*, 13 C. B., N. S., 105. These I cite because they shew, what would indeed be quite obvious without reference to any authority, *the necessity of proving agency.* Quite apart from every other consideration,

the defendant could only have a lien for *his own labor and that of his workmen* done on the chronometer. See *Rosc. N.P.*, last edition, p. 958. His words are, "In general where a person bestows his labor on a particular chattel delivered to him, *in the course of his business*, he has a lien upon such chattel for the amount of *his charge*." Roscoe says also at page 961, "In order to establish a lien, it must appear that the work, &c., in respect of which it is claimed, was done *at the request of the owner of the goods detained* ; citing *Hiscox v. Greenwood*, 4 Esp. 174 ; *Hollis v. Claridge*, 4 Taunt. 807. We have seen that, in view of principles, the lien asserted in this case cannot be implied ; but, further, it is obvious that consequences most unreasonable would result from drawing an unwarrantable inference of a contract. Let us suppose a decision given adverse to the judge's ruling, and by consequence to the plaintiff. What will be the effect of the decision as a precedent ? My glimpse at the future will, perhaps, not be the less striking, if I venture, without precedent, it may be, to put it into a dramatic form. I shall *imagine* nothing, but confine myself to supposing such another case as this arising hereafter with its natural incidents. At some future day, "Colonus," a plain farmer, visits this city, having found his watch unreliable for measuring time. He is attracted by a great display in a shop window, of clocks, watches, optical instruments, &c., with a gay sign over the door on which are artistically depicted symbols of the work to be done within ; surmounted by "Old Time" with his scythe, and as a motto beneath

"TEMPUS EDAX RERUM."

He does'nt understand a word of this ; but, mayhap, he will make a practical application of it by and by, and to his cost. He walks in, and presents his watch to "Astronomus," the head of the establishment, and, acquainting him with his desire to have his antiquated and damaged instrument rehabilitated, in these words, "I want my watch put in order," receives an assurance from "Astronomus" "that it shall be made all right." Not another word marks the interview. At a future day, "Colonus" revisits the city and the shop, and, inquiring for the old companion of his wayfaring, the following dialogue takes place :

Col. I have called, Sir, for my watch, and I hope you have made it "all right," as you promised.

Astr. Your watch, Sir, required, as I found when I took it to pieces, a new spring which not one man in a thousand could make, and I have sent it to *Germany* where alone that spring can be made. It is now in the hands of a "clever chap" at Berlin, of my acquaintance, who will do it "first rate," and for a mere song. It will be here by the next mail, when I'll send it to you with my "little bill."

Col. Sent my watch to *Germany*, Sir; you had as much right to send it to *China*! Why didn't you ask me, Sir, if I was willing it should be sent anywhere out of the Province, or out of your own shop. What reason had I for supposing that you and your own people could'nt do, in your own shop, all that you held out to do, and all that I wanted done? Will you please answer me that? I don't know anything about Berlin, or your friend, the "clever chap," either. Your little bill, as you call it, will be for just what *you* choose to pay the "clever chap," right or wrong. I can't go to Berlin, or send there, to find out what he ought to be paid, without having another "little bill" to pay. I have nothing to do with him, and never gave you the slightest reason to suppose that I ever intended to have, either. What have you got to say to this? The watch, although it served me well enough, wouldn't have sold in the market for the amount of your "little bill." It belonged to my great-great grand-father, and for that reason I wouldn't have run the risk of sending it *over the sea*; but if you'd have just spent five words of your breath in telling me what you intended to do with it, I would have *thrown it into the sea* before I would have been saddled with the double cost, first of having it repaired by your "clever chap," in Berlin, and second, of finding out, there, what ought to be paid for repairing on it. I won't pay you one cent, if you pay the "clever chap," whose services you ordered, but I did not.

Astr. Keep cool, old fellow? we'll see about that. You talk reason, perhaps, but you don't talk law. At all events, you won't talk so big when you come to know the law as well as I do. If you'll take my advice, you'll go and read *Webber v. Cogswell*, 2 Russell & Chesley, 47.

Thoroughly disgusted, "Colonus" returns home, to measure

time a little longer by the Sun. After a certain interval, however, he has a second interview with "Astronomus," which is marked by the following friendly interchange of sentiment :

Col. I have called again, Sir, for my watch—is it ready for me ?

Astr. No it ain't; but my little bill is—the amount is just \$45, which let me have at your earliest convenience. The watch, I guess, you're not likely to see again. It was made "all right," at Berlin, by the "clever chap," I told you of, and it was duly shipped on board the Steamship "Bismarck," but, unfortunately, she got on the Isle of Sable, and perished with much valuable property besides your chronometer. I am sorry for you, my good man, but let me have my "little bill" as soon as possible, for I'm very short of money."

Thereupon, "Colonus," not unnaturally perhaps, begins to rave, and to utter some bitter things that I needn't repeat. He rushes out of the shop, however, fiercely declaring his intention to have law, if law can be got, at whatever cost.

As he makes his exit, he hears "Astronomus" exclaiming, at his rear, in the most contemptuous tones, "if it's law you want, old fellow, you shall have it, and I'll tell you where you'll find it; in *Webber v. Cogswell*, 2 Russell & Chesley, 47."

What I have thus presented in a jocose form, is nevertheless in its essence, solemn, serious, and, as I apprehend, unanswerable argument, based on common sense and common law.

This question, consisting of seven words, viz : "*Shall I send the instrument to Boston?*" uttered by defendant to plaintiff, would have prevented the litigation which has marked the case. That question not having been submitted, my mind is too obtuse to understand on what principle this plaintiff, under the evidence, is to be subjected to an adverse judgment, with its incidents and consequences.

In the judgment delivered by Lord KINGSDOWN in *Kirchner v. Venus*, 12 P. C. C., 392, occur these words, which in respect of principle, are applicable here : "But in such case the right of lien depends entirely on the agreement, and if the parties have not in fact made such a contract, it is very difficult to understand upon what grounds it can be implied, or why, upon failure of performance of the agreement which they have

"made, the law is to substitute for it another and very different contract which they have not made. To use the language of Lord ELLENBOROUGH, in *Stevenson v. Blakelock*, 1 M. & S., 543: 'Where there is an express antecedent contract, between the parties, a lien which grows out of an implied contract, does not arise.'" This is followed by an *argumentum ex inconvenienti* very forcibly urged by His Lordship, and, in principle, entirely applicable to the condition of this plaintiff on the supposition of a judicial recognition of a lien in the case before us. Was he to incur the inconvenience and expense of sending to Boston and procuring the necessary testimony there to ascertain the price of a skilled mechanic's labor in a strange land? And yet, unless he did so, he would be kept out of the use of his property, or must submit to reimburse the defendant any amount of money that he, in his discretion, chose to pay that foreign mechanic. It is a principle, also, ruling such cases as this, (see *Winks v. Hassall*, 9, B. & C., 372) "that a lien cannot be supported by a voluntary payment." Was not the sum disbursed by defendant at Boston a mere voluntary payment? If it was not, let it be shown how and where the plaintiff authorized it before it was made, or sanctioned it afterwards.

Again, it is a principle (See *Fish. Dig.* p. 5447; and *Madden v. Kempster* 1 Camp., 12) "that a party cannot acquire a lien by his wrongful act." Was it not a wrongful act in this defendant to send the plaintiff's chronometer to Boston? It was such, unless the plaintiff, having notice of the intention of defendant to send it, authorized its being sent there. When and how had he such notice? When and how did he authorize it before it was sent, or sanction the act of sending it afterwards? If it had been lost in transit, where would an authority be found for defendant's immunity from liability for the value of it? Would it be found in the words of the contract "plaintiff said put the instrument in order?" Out of those words we know it cannot possibly be found.

Lord KINGSDOWN, as we have seen, spoke of "an express antecedent contract" as materially affecting the question of "lien." We know what the express antecedent contract was here,—it was "plaintiff said, put the instrument in order."

The defendant's plea has shewn us how he understood it. I take the liberty of observing, that if the words "plaintiff said put the instrument in order," had any reference to an artisan in Boston—if they suffice to make defendant plaintiff's agent to employ the foreigner,—and so to raise a lien in this case, then, as Talleyrand said, "the only use of words is to conceal your meaning."

The rule, in my opinion, should be made absolute.

BENJAMIN v. TOBIN.

Where defendant demurred to plaintiff's replication and plaintiff moved to strike the cause off the docket, on the ground that defendant had not filed the demurrer book at Halifax on the Tuesday preceding the term, the Court refused to strike off the cause, holding that the carriage of the demurrer was with the plaintiff, who had a right to say whether he would bring on the demurrer or the pleas first.

To a declaration for carrying away and converting goods of the plaintiff, defendant pleaded justifying the taking as a distress. Plaintiff replied that the distress was excessive, and by other replications alleged in different forms that the amount of the rent had been satisfied by repairs, the cost of which defendant had agreed to deduct from the rent. *Held*, on demurrer to the replications, that the replication alleging an excessive distress was a departure and therefore bad, and that the demurrer thereto must be allowed with costs;—that the other replications would be objectionable on special demurrer only, and that as respected them each party should pay his own costs.

To a declaration containing three counts, first, for the conversion of the plaintiff's goods by the defendant, Tobin; secondly, for the taking and carrying away of said goods by Tobin, and thirdly, for the taking and converting of the said goods by one Taylor as bailiff of Tobin, the defendant in his sixth plea, averring the identity of the causes of action set out, justified the taking as a distress for rent of premises, whereof the plaintiff was tenant to the defendant, Tobin. The plaintiff, by his third replication, alleged that the defendant had taken goods of much greater value than the amount of the rent due, although part of said goods was of sufficient value to have satisfied those arrears, and might have been distrained for the same, and thereby the defendant, Tobin, made an excessive distress for the arrears due, if any. The fourth and fifth replications set out a contract, whereby the plaintiff was to make repairs, the costs of which should be deducted from the rent, and contained an averment that repairs were made under that agreement, the cost of which exceeded

the sum claimed by defendant as rent. By the sixth replication plaintiff said that the claim for rent was fully satisfied by work done by the plaintiff for the defendant, Tobin, at his request. To these replications defendant demurred on the ground that the said replications were founded on matter which was a departure from the declaration, and from the grounds of defence relied upon in the sixth plea, and were an attempt to raise an issue which did not fortify or support the declaration, but were immaterial and irrelevant.

On motion day, January 8, 1876, before the full Court :

McCoy, on behalf of plaintiff, moved to strike the cause off the docket and for judgment for plaintiff, on the ground that the demurrer book had not been filed in Halifax on the Tuesday preceding the Term, (*R. S.*, Cap. 94, Sec. 218,) and was not on file.

J. W. Johnstone, Q. C., contra. Cites *Tidd's Practice*, 718, and contends that the demurrer book must be made up by the plaintiff.

McCoy, in reply. It has been the practice that the party demurring should make up the demurrer book. This is a demurrer to a replication. It has been held here that the party against whom a demurrer is taken cannot enter the demurrer for argument. The party demurring must have the papers on file.

RITCHIE, E. J., now (January 10, 1876,) delivered the judgment of the Court :—

The application to strike this cause off the docket ought not to prevail. The carriage of the demurrer is with the plaintiff, and if the cause had been struck off it would not have given judgment to either party. The plaintiff is the person who has the right to say whether he will bring on the demurrer or the pleas first, and if the defendant wishes the demurrer to precede the pleas, he has to apply to the Court.

The cause now (February 8th, 1876,) came on for argument on the demurrer to the replications.

J. W. Johnstone, Q. C., in support of demurrer. The agreement set out in the replication is not sufficient to avoid the right to distrain. But apart from that, this replication is a

departure from the declaration. *1 Tidd's Pr.*, 688. If the plea had been an evasive one the plaintiff might have replied reducing the grievance to greater certainty and particularity. *Woodfull's Landlord and Tenant*, 647 and 652; *16 East*, 41; *1 Willes*, 334.

McCoy contra. The replication simply confesses and avoids Defendant's plea of a distress by shewing that the rent was paid. It supports the declaration, and is therefore no departure. *Harrison's Com. Law Pr. Act*, p. 164; *1 Best & Smith*, 839; *L. R.*, 5 *C. P.*, 4. In a case like this the landlord cannot make a distress, because the amount actually due was not ascertained. *7 Bingham*, 451. If, therefore, the replication setting up the repairs is not held to be a plea of payment, it is still a good answer to the plea of distress, as it shows that the amount of rent due was not ascertained. With regard to the replication alleging excessive distress, our statute is different from the English statute. Cites *R. S.*, 4th ser., p. 585; *Woodfull's Landlord & Tenant*, 1015.

J. W. Johnstone, Q. C., in reply. If a landlord cannot distrain because the rent due is not ascertained, a tenant might defeat his landlord's remedy by putting in a pane of glass and refusing to settle. Cites *Niblet v. Smith*, 4 *T. R.* 504; 2 *W. Saunder's Rep.* 436.

WILKINS, J., now (December 12th, 1876,) delivered the judgment of the Court:—

This is the case of a demurrer to replications. The declaration contains three counts, the first for conversion of goods, the second for the taking and carrying away by defendants of the same goods and converting to their own use; the third charges one Taylor as defendant, Tobin's, bailiff, with the acts of taking and converting the goods in question.

The sixth plea alone is necessary to be considered. In it the defendant, averring identity of the causes of action set out in the counts, says, in substance, "one Stephen Benjamin had held and enjoyed a certain store as tenant of the defendant, Tobin, by virtue of a demise, at an annual rent of one hundred and forty dollars; on the day, (specified,) that sum was due for a year's rent to the said defendant, and he in his own right, and Taylor as his bailiff, entered the store to distrain and did

distrain the goods for the rent in arrears, which are the same trespasses, &c.

The only replications necessary to be noticed are the third, fourth, fifth and sixth, all going to the said sixth plea. Considered consecutively, they are substantially as follows:—By the third, plaintiff says defendant Tobin wrongfully distrained goods of plaintiff of much greater value than the arrears of rent due although part of said goods was of sufficient value to have satisfied those arrears, and might have been distrained for the same; and defendant Tobin thereby made an excessive distress for said arrears, if any, contrary to the statute.

By the fourth replication, plaintiff alleges a demise from defendant Tobin to one Stephen Benjamin, as agent of one Orpin, of the store, subject to an express undertaking and agreement between defendant Tobin and said Stephen Benjamin, as such agent, to permit repairs to be made to make the store tenantable, and that the costs thereof should be deducted from the amount of the rent. This is followed by an averment that the repairs were made and the costs exceeded the sum claimed by defendant Tobin for the rent.

By the fifth replication, the plaintiff says that which is substantially identical with the matter stated in the preceding replication.

By the sixth replication, plaintiff says, substantially, before action brought, defendant Tobin's claim for rent was fully satisfied by work done by the plaintiff or Stephen Benjamin for defendant Tobin and at his request.

To all these defendants demur, saying "they are all bad in substance, for the following reasons, that is to say: that the said third, fourth, fifth and sixth replications to the defendant's sixth plea are founded upon matter which is a departure from the declaration and from the ground of defence relied upon in the said sixth plea, and attempt to raise issues which do not support or fortify the declaration, but attempt to raise issues which are the subject of another action, and are immaterial and irrelevant.

It seems to me that thus to state distinctly the whole matter before us, of itself suffices to show what the judgment upon it must necessarily be. The fourth, fifth and sixth replica-

tions, if under the old system of pleading they had been pleaded, would have been objectionable only on special demurrer as amounting, relatively to the sixth plea, supposing the matter of it to be the subject of a declaration, to the general issue, being, in effect, an allegation in answer to the defence of taking for rent due, "*that no rent was in arrear.*" They amount to a denial that any rent was due. Section 121 of the Practice Act and the sections that immediately follow in the same matter, seem quite decisive on the point of our enquiry.

As regards the third replication, the objection to it in point of law seems quite unanswerable. Confining our consideration to it in connection with the declaration, it is inconsistent with the latter and clearly involves a departure from it, seeking to introduce a new and distinct matter of issue from that sought to be raised by the declaration and the sixth plea. The former complains of an act done by defendant as wrong and illegal, as a wrong without qualification. The plaintiff, by his third replication, alleges that the act of defendants complained of, and by them attempted to be justified, is not an absolute and unqualified wrong, but only a wrong in a qualified sense, and the replication treats it as that specific wrong for which the law gives a different remedy from that adopted and primarily relied on by the plaintiff. He thus, by the third replication, seeks to assume a *locus standi* before the Court, different from that in which he first presented himself to it by his declaration.

The demurrer to the third replication must be allowed with costs. The objections sought to be raised in point of law to the other replications are not, I think, legitimate subjects of a general demurrer. As respects those, each party should pay his own costs.

TUPPER vs. CAMPBELL.

The Plaintiff claimed a right of way over land of the Defendant from a meadow lying in the rear of Defendant's land to the highway. He testified on the trial that T. Gourley, the previous owner of his lot of land enjoyed an easement for thirty years, adversely to the party from whom the defendant derived title, but he produced no deed, and did not show that the easement, if such there was, had been conveyed to him. He also claimed, under a deed of the meadow, from the executors of T. Gourley in 1861; but as there was no evidence, except that of the plaintiff himself, of a continuous user by Gourley for twenty years, and the evidence taken altogether negatived such a user, it was held that neither T. Gourley nor his executors could convey any right of way to the plaintiff, and that the verdict for the defendant must be sustained.

This action was brought against the Defendant for the obstruction of a right of way claimed by the Plaintiff over the Defendant's land. It appeared in evidence that the whole of the land now occupied by the Plaintiff and Defendant had been formerly owned by one Thomas Gourlay, deceased, who had made a road at his own expense to enable him to haul his hay from the meadow in the rear of the land now in possession of Defendant. The road was used by Thomas Gourlay for many years, and by other persons with his permission, but he always retained his control over it and kept bars across it. At his death his son Thomas entered on the portion occupied by Plaintiff, and Stephen Gourlay became possessed of that now in possession of Defendant. The Plaintiff had occupied the lot so entered upon by Thomas Gourlay, with the exception of the meadow, for eighteen years, and had occupied the meadow since December, 1861, under a conveyance from the executors of Thomas Gourlay the son. He testified on the trial that Thomas Gourlay had used the road in question for thirty years adversely to his brother Stephen, through whose land it passed, but he produced no deed of his lot of land and did not show that Thomas Gourlay's right of way, if any, had been conveyed to him. In the deed from Stephen Gourlay to the Defendant the road in question was not reserved, but passed with the rest of the lands, nor was there any reservation in the deed from Thomas Gourlay, deceased, to his son Stephen, but plaintiff contended that the easement passed to him under his deed, dated in 1861, from the executors of Thomas Gourlay, the son, who died some thirteen years before the trial.

The cause was tried before McCULLY, J., in Truro, in February, 1875, and a verdict found for the defendant; a rule to set aside which, on the ground that the verdict was against law and evidence, and for misdirection, was granted by the Judge.

McDonald, Q. C., in support of the rule.—Permission asked to use an easement to which a party has a right does not affect the right. *Washburn on Easements*, 125, 130; *2 Mass. Dig.*, 814; *2 Pick.*, 466; *6 Cush.*, 254. A right of way appurtenant to land passes by a deed of the land without express mention. *10 Pick.*, 138, *1 H. & N.*, 916; *9 Exch.*, 1.

Non-user for less than twenty years does not amount to abandonment. *Washburn on Easements*, 312, 341.

Up to the period of the action there were twenty-five years user as of right by the plaintiff. The grantor of the plaintiff admits the right. An attempt was made to set up a defence by proving alteration of the road made eighteen years before. The evidence of that is only of strangers who seldom went there.

The right is proved to be appurtenant to the meadow described in the plaintiff's deed. There was a user of a right of way by Thomas Gourlay for twenty years, appurtenant to the meadow, and that passed without words referring to right of way.

W. A. Johnston, Q.C., contra. We have three deeds here. The deed in 1861 from executors of Thomas Gourlay to the Plaintiff does not give him any right of way, does not even, as is usual, mention ways. The deed from Thomas Gourlay to Stephen Gourlay reserves nothing at all. Stephen Gourlay is estopped from declaring that there is any right of way, as inconsistent with his deed, to the Defendant.

McDonald, Q. C., objects. The deed is not initialled.

(The minutes describe the deed and mention it as tendered and read, and the Court decide that the identification is sufficient).

W. A. Johnston, Q. C. The deed from Stephen Gourlay to the defendant contains no reservation of a right of way. Stephen Gourlay having given to us a deed of all his interest and not having reserved a right of way is estopped from saying that there is a right of way.

In the case *10 Pick.* there was an express reservation. In *1 H. & N. 961*, the right was based on necessity. In the present case there was no necessity.

Cites Sec. 18, 19, 20, Acts of 1866, Cap. 12. Old Mr. Gourlay owned the whole of this land, and gave a portion to each of his sons. The plaintiff's title commenced in 1861 by deed from the executors of Thomas, the son.

This is not a way of necessity, because it is clear that plaintiff can get upon this meadow by going over his own land. Instead of his being land-locked, it is the defendant that is land-locked.

Plaintiff has only owned the meadow since 1861, ten years before action brought, and the front land eighteen years. The way was a barred way, there were bars across all the time. The way was altered at the very place as to which this controversy takes place. The old road was sowed in peas for two years. The user must be uninterrupted. The user has not been uninterrupted. Nothing that occurred in Thomas Gourlay's life-time can enure to the benefit of the plaintiff. *Angell on Watercourses*, 195, 198, 250; *3 Exch.*, 161, 168; *2 Washburne*, 291.

A single act of interruption is of more consequence as indicating intention than a long enjoyment. *PARKE B.*, in *11 M. & W.*, 827; *4 M. & S.*, 337; *10 Exch.*, 824; *2 Bing.*, 76.

On a severance of tenements which have enjoyed a right of way during unity, no right passes to the dissevered tenements. *1 B. & S.*, 571—582.

No uninterrupted possession for twenty years. It is in the evidence for plaintiff that permission was asked.

DESBARRES, J., now (Dec. 12, 1876,) delivered the judgment of the Court:—

This was an action for obstructing a way or easement, claimed by the plaintiff, over the land of the defendant, the right to which was denied by the defendant. The cause was tried before Mr. Justice McCULLY, at Truro, in February, 1875, and a verdict was found in favor of the defendant. The learned Judge, on motion of plaintiff's counsel, granted an order *nisi* to set this verdict aside, on the ground of its being against law and evidence and for misdirection, and the cause was argued before the full Court in January last and now remains to be disposed of. It appears, from the Judge's report, that the whole of the land now occupied by plaintiff and defendant in separate lots was at one time owned and occupied by one Thomas Gourlay, deceased, who, for his accommodation and at his own expense, made the road in question through it to enable him to haul his hay from what is called the meadow, lying on the rear of the land now possessed by defendant. This road was used by old Thomas Gourlay for this purpose for many years, and it was also occasionally used by other persons owning meadow land for the same purpose, by permis-

sion of Thomas Gourlay, who always kept bars across the road and retained his right of property in and control over the land. At the death of Thomas Gourlay, the elder, his son, Thomas, entered upon that portion of his father's land now occupied by plaintiff, and Stephen Gourlay, another son, became possessed of the land now occupied by defendant. The plaintiff for eighteen years has occupied the land on which Thomas Gourlay, the son, resided, with the exception of the meadow, and has occupied a lot in the meadow since the 11th December, 1861, which was conveyed to him by a deed executed on that day by the executors of Thomas Gourlay, the son, and now claims a right of way from this meadow lot over the land of the defendant to a public highway, and from the highway to his said meadow, for himself and his servants, with cattle and carriages to pass and repass at all times of the year: and the question is whether he is entitled to the way or easement so claimed. The learned Judge, in charging the jury, rightly instructed them that this right of way could only be obtained by grant, by user, or by necessity, and I think he was right in saying that, as there was no actual grant, and no evidence to warrant the presumption of any grant, and none to show that a right of way of necessity existed, the plaintiff could only claim the right by a continuous user in himself for twenty years. On being called as a witness on his own behalf, the plaintiff stated that Thomas Gourlay used the road in question for thirty years before he purchased his lot from him, and it was contended that as Gourlay had thereby acquired a right of way over defendant's land, he, as the occupant of that lot, was entitled to the same easement over defendant's land. A continuous user of the road or way by Thomas Gourlay, if there was such, for that long period of time, adverse to and with the knowledge of his brother Stephen, through whose land it passed, would unquestionably give Thomas an easement over the defendant's land. But as the plaintiff did not produce any deed from Thomas Gourlay of his lot of land, and failed to show that the right of way or easement which Thomas Gourlay, as the possessor of that lot, acquired or had, whatever it was, was conveyed to him, the plaintiff cannot avail himself of Thomas Gourlay's user of the way and must rely on his own, which, of itself, is not sufficient

to entitle him to assert a right of way over the defendant's land. The evidence of Stephen Gourlay, on which the plaintiff relied, does not appear to me to strengthen the plaintiff's case, as it was contradictory of and inconsistent with itself. He stated in his direct examination that there never was any obstruction placed on this road, and that while he was there it was used less or more from the time his father made it until he left, and yet he said in his cross-examination that his father made the road for his own convenience, as a private road, and placed bars across the mouth of it, and he himself fenced across the road in the rear every year he occupied the land, and further, that in executing a deed to defendant of his land, the road in question was not reserved, but passed with the rest of the land to the defendant. There was also no reservation in the deed made by old Thomas Gourlay to his son Stephen, on the 3rd November, 1843, of the land over which a right of way is claimed by plaintiff, a title to which passed to Stephen, together with the rest of the lot thereby conveyed to him, showing that it always remained and was nothing more than a private way for the owner of the soil, and that the use of it by others was a permissive use, which gave them no right. The plaintiff does not claim this right of way by necessity, or as appurtenant to the land in his occupation; he claims it by an user which he contends gave Thomas Gourlay, the son, an easement over defendant's land, that passed to him with the deed of December, 1861, from his executors. Now, apart from the plaintiff's own, there is no evidence of a continuous user of the way by Thomas Gourlay, the son, for twenty years. It is clear, if he entered into possession of his lot at the death of his father, and died, as was proved, twelve or thirteen years before this suit was tried, he could not have used the way for that length of time, and neither he nor his executors could convey any right therein to the plaintiff. The evidence produced on the part of the plaintiff in support of his case, taking it altogether, is not, to my mind, such as would have warranted the jury in finding a verdict in his favor, and therefore I think the rule for a new trial must be discharged with costs.

WATERS v. McCULLOCH.

Plaintiff, representing himself to be the agent of owners of land which defendant had occupied, as a squatter, for twenty-six years, induced defendant to sign several promissory notes, stating that he would give defendant a deed of the land, defendant to give him a mortgage for balance of purchase money. Defendant never received the deed, nor gave the mortgage.

Held, that the plaintiff had failed to prove consideration for the notes.

Held, also, that, although there was no plea of insufficient or illegal stamping, yet, as evidence of illegal stamping had been received at the trial without objection, the question of the legality of the stamping was for the consideration of the Court.

Held, also, the notes not being originally legally stamped, that the plaintiff, as he became holder, if at all, at the time of the making of the notes, and was therefore cognizant of the circumstances surrounding their execution, could not validate them by double stamping, under act of 1870, cap. 13, sub section 12.

This was an action to recover the amount of two promissory notes. Defence—want of consideration. The cause was tried at Truro in October, 1875, before Mr. Justice McCULLY. The material facts of the case are concisely stated in the judgment of the Court. Defendant's counsel moved for a non-suit on the ground that there was not sufficient proof of consideration, and that the notes were not properly stamped. The Judge declined to non-suit and the jury found a verdict for plaintiff. A rule nisi to set the verdict aside and to enter a judgment of non-suit was granted and argued this Term.

W. A. Johnston, Q. C., in support of rule. The Stamp Act of 1870, Sec. 11, renders this note invalid. Sec. 11 of that Act is not repealed by the Act of 1874. The holder of the note only is authorized to double stamp, under the Act of 1874. King, who put the double stamps on this note, was not the holder. Cites *Stevens, N. B. Dig.*, 65. There is no proof of consideration for these notes. The plaintiff himself says that he did not tender the deed for which the notes were given after the notes were signed.

Rigby, Q. C., contra. King swears that at the time the notes were given he tendered the deed. Cites *R. S.*, 4th Ser., Cap. 94, Sec. 136. The fact of imperfect stamping is not pleaded. The defendant's counsel will say that the note being imperfectly stamped is void, and could not be given in evidence; but there are numerous cases where instruments are expressly declared by statute to be void, and yet that defence cannot be set up without being pleaded, as for instance where

a note is void for illegal consideration. *Byles on Bills*, 116 n., and the cases there cited. The stamps on these notes comply with the requirements of the original Stamp Act of 1867. The provisions of that Act, unrepealed, require certain things in the alternative. These stamps contain the initials of the maker, which is sufficient to make the stamping legal, and the fact that they contain a wrong date does not affect them. Cites *Neil vs. McIntosh*. Cites also *15 U. C. L. R. C. P.*, 237.

Weatherbe, in reply. This case could not stand a moment under the authority of *Mardoch vs. Dunn*. It depends upon the Act of 1874. King, who double stamped the notes, certainly could not swear as to plaintiff's knowledge of insufficient stamping. It is clear from the evidence that Waters was present when the notes were given. The Act of 1874 requires two things to appear to the Court; first, that the holder was not aware of the defect in the stamping when he took the notes, and, secondly, that he remedied the defect as soon as it came to his knowledge. Neither of these two things appears in this case. It does not appear that King had any authority to double stamp these notes.

WILKINS, J., now, (December 12th, 1876,) delivered the judgment of the Court.

The material facts of this case, apart from the stamp question are these :

Waters, the plaintiff, to whom the notes in question were given, came to this province, professing to be, but not by act or document proved to be, agent of Mr. and Mrs. Lewer, said to be, but not in anyway proved to be, entitled, as heirs of Marchington Grant, to the land which was to be subject of an alleged transfer to defendant, that was to be consideration of the notes. The plaintiff prepared the notes and left them with a witness, *King*, for the purpose of procuring execution of them by the defendant. Defendant signed them, (being read to him,) by making his mark in *King's* presence. *King* represented himself to be an agent of the parties entitled to the land, but stated that he was not such at the time when the notes were given. He further stated that a deed of the land, (not exhibit-

ing it,) which defendant occupied, was left with him, *King*, (not stating by whom,) which was the consideration of the notes. *King* further said defendant was to get the deed, but he was *first* to bring his wife to execute a mortgage, that defendant never brought his wife, nor executed the mortgage. The witness added: "the deed was left with me, (not stating by whom,) when the notes were given;" also, "I asked the defendant to come and get the deed and give me a mortgage, and he said he would, but never did." The witness concluded by saying: "defendant is in possession—it was given the day the notes were signed." When this last statement, however, comes to be viewed in connection with the positive testimony of the defendant, *uncontradicted*, to the effect that he had been in possession twenty-six years, the witness could not have intended to say that defendant then, *for the first time*, entered into possession.

The foregoing constitutes the plaintiff's case. Defendant said: "I asked *King* if he thought they could give a good title to the land." He said that "they could." I said, "I was afraid to buy for fear I could not get a good title." He added, "He (*King*) said the best thing I could do was to purchase the land for the rest—all had agreements from Mr. Johnstone—that being only a squatter there I was liable to a 'Penitentiary Act.'" That the defendant was illiterate, and could neither read nor write, was proved by him.

King was not afterwards called to contradict any of defendant's statements. Now, on a general consideration of the undisputed facts, these observations are suggested. These negotiable notes were given to Waters—payable to *him* or *his* order. As between Waters and defendant, they would appear to be given without any consideration whatever. Whether Waters represented any person having title to the land, or whether the deed spoken of ever professed to convey it, and warrant the title, is entirely uncertain. Waters—a stranger just arrived from a foreign country—having taken the notes in his own name, from an illiterate man, too, should have proved his agency, and the right of those whom he professed to represent, and have shewn the deed, proved to be in his possession, inasmuch as it was in the hands of *King*, who

acted for him. To say nothing of what the legal effect of defendant's long possession of the land might be, nothing could be more natural or reasonable than the doubt he felt and expressed as to the competency of those whom Waters or King professed to represent, to give a sufficient title. There is a plea of want of consideration, and the proved facts put plaintiff under an obligation to establish it, which he failed to perform. On the evidence, received without reference to the objections under the Stamp Acts, it appears to me impossible to give judgment for the plaintiff. On that ground, if it were the only one, our judgment must be, in my opinion for the defendant.

There is no plea alleging insufficient or illegal stamping, Such, according to my present impression, is necessary, and the objection that there was no such plea, if made at the trial must, I apprehend, have prevailed. It is unnecessary, however, to give a judgment on that point. The minutes do not shew that any objection to the evidence given on the last mentioned ground was made to its reception. Had it been made an application for leave to amend by adding the deficient plea might have been made, and might have been commended to the learned Judge's favorable consideration by the facts before him. It is clear the notes were not, at the time of making them, legally stamped. They were not affixed on the day of the date on the face of the instrument, but on the day when the defendant signed them. Therefore, in view of Sec. 4 Chap. 9, of the Dominion Acts of 1867, even assuming that King could do the act required, the provision in question was not complied with, as to the mode of cancellation. The plaintiff sought to validate under Chap. 13 of the Acts of 1870, sub-section 12, as considering himself, probably, a "*holder without becoming a party thereto.*" Yet, he became "*holder,*" if at all, *at the making of the notes*, and was at that time personally conusant of all the circumstances surrounding the execution. He is not, therefore, in respect of the act of double stamping, on which the plaintiff relies, within the section under consideration.

I am of opinion that the verdict for the plaintiff must be set aside, and judgment of non-suit be entered for the defendant.

CROW, ET AL, vs. LOWDEN, ET AL.

Plaintiffs' testator, C. C., took a conveyance of land from M. P. M., paying £100 for the land, at the request of defendants, J. L. and R. L., who had previously occupied and continued to occupy the land. Plaintiffs, having brought an action of ejectment to recover the land from the defendants, produced two witnesses, who swore that defendants had paid money to and worked for C. C., in payment of *rent*; while one of the defendants, J. L., swore that defendants never paid *rent*, but *interest*, and that they were to repay the £100 to C. C., but that no time for repayment was fixed.

Held, by the Court, acting under a rule *nisi* to set aside a verdict taken by consent, with the power of a jury to draw inferences from the facts, that the relation of landlord and tenant existed between C. C. and the defendants, J. L. and R. L., and that consequently they were estopped from disputing his title.

This was an action of ejectment, brought by Charles Crow, in his lifetime, and after his death prosecuted by his executors, the present plaintiffs, to recover possession of certain lands in the County of Colchester. The circumstances of the case were as follows:—In 1850 the land in question was sold at Sheriff's Sale, as the property of Robert Vance, under an execution of one Almon, and bought by Mark P. Martin, who took a deed from the Sheriff, dated 24th August, 1850. In 1855 the defendants, who appear to have occupied the land for some time previous, applied to Charles Crow, the original plaintiff in this action, to interpose between them and Martin, who was threatening to turn them off the land. At their request, Crow paid Martin £100 and took a deed of the land, leaving them in possession. During a number of years, the defendants made payments to Crow, in money and work, up to 1874, shortly before this action was brought. The defence mainly relied on was contained in an equitable plea, setting up that the defendants held the lands in trust for third parties. The cause was tried before Mr. Justice McCULLY, at Truro, in 1875, and on the suggestion of the learned Judge, a verdict was entered for defendants by consent, subject to the opinion of the Court, acting with the power of a jury to draw inferences from the facts. A rule *nisi* to set the verdict aside and enter judgment for plaintiffs was taken out and argued this Term.

Rigby, Q. C., in support of rule. It is immaterial in this case whether the money paid by defendants to plaintiffs is considered as interest or rent. If interest, then the plaintiff is a mortgagee and has a right to bring ejectment. The defend-

ants are estopped from denying plaintiff's title; *Sugden on Vendors*, 743: *Bigelow on Estoppel*. But two witnesses here declare the payments were spoken of as rent.

W. A. Johnston, Q. C., (with whom was Weatherbe,) *contra*. The plaintiff here has not proved title. He can only recover by shewing that he has brought himself within the Statute of Limitations. There is a contradiction as to whether the money was paid as rent or as interest. The plaintiff's evidence is not enough to establish a tenancy. The payment by one defendant, which is all that is proved, is not sufficient to bind the other. If the relation of mortgagor and mortgagee existed, should not the plaintiff show that the term had expired?

RITCHIE, E. J. Not necessarily.

Weatherbe. Assuming that the plaintiff recovers here on the ground of being the landlord alone, if the plaintiff comes in and swears that he is landlord and that the defendant has paid rent, and the defendant swears that he never knew him and never paid rent, can the plaintiff recover? The evidence of the plaintiff is that one of the defendants asked the plaintiff to buy the place and he would recompence him in labor and money as far as he was able. It is not a case of landlord and tenant. If estoppel is to be set up on account of the relation of landlord and tenant, the relation must be distinctly proved. There was no relation of landlord and tenant here at all. The money that the defendant paid he paid not as rent but as interest.

It is argued that if the money was paid as interest the plaintiff must be held to be in the position of a mortgagee. What was the term of the mortgage? The mortgagee could not go into possession before the expiration of the term.

Rigby, Q. C., in reply, cites 7 *Q. B.*, 296.

DESBARRES, J., now (December 12th) delivered the judgment of the Court.

This was an action of ejectment, brought in the name of Charles Crow, in his life-time, and prosecuted since his death by the plaintiffs, as his executors, &c., against the defendants, to recover the land and premises described in the Writ. It

was tried at Truro, and a verdict was rendered by consent for the defendants, subject to the opinion of the Court, who were to have the same power as a jury to draw inferences from the facts and to direct judgment to be entered for the plaintiffs or defendants, as the Court might order. It appears that the land in dispute was sold by the Sheriff of the County of Colchester, as the property of Robert Vance, under an execution against him at the suit of one Almon, and it was purchased by Mark P. Martin, to whom it was conveyed by deed, dated 24th August, 1850, and by Martin conveyed to Charles Crow, on the 18th December, 1855, for the consideration of £100. Crow, the purchaser from Martin, did not enter into possession, but allowed the defendants, who occupied it at the time, to remain on the land. Thomas Crow, one of the plaintiffs, who was examined as one of the witnesses, stated that some time before the 18th September, 1855, John Lowden, one of the defendants, came to his brother Charles and told him he was in great trouble, that Martin told him he would have to leave the property; and wanted his brother to help him out of his trouble, and wished him to take the place from Martin and relieve him from his distress, saying he would recompense him for the place and the rent in money and work, as far as he was able; that his brother, after that, got a deed from Martin of the land, and to his knowledge the defendant paid his brother Charles yearly rent for the property to 1874; that he worked with his brother, and while in his employ went to the defendant's to come and work for him on account of rent; that John Lowden, in 1864, paid his brother Charles, in his presence, £2 for rent. On cross-examination this witness stated that defendant occupied the land before his brother purchased it; that his brother paid the £100 for the land to Martin, at the request of John Lowden, and Robert Lowden after that came and worked for his brother whenever he was sent for; that he never heard of any agreement to repay his brother Charles for the place, and knew of no money being paid him other than the £2. Lucius Crow, another plaintiff, and nephew of Charles Crow, stated that he lived with his uncle up to his death, and was present on one occasion in 1855 at a conversation between his uncle and John Lowden, who wanted his uncle to take the land, saying he would pay as much rent as he

could for it, and that a month or so after that, his uncle took the place; that in 1857 John Lowden paid his uncle four pounds, saying he had raised that much in part payment of the rent; that he went for the defendants after that to come and work for his uncle. They came and worked for him time after time until 1870, but he could not say they did so every year. Upon this evidence the plaintiffs rested their case, and the defence set up was that there was no proof of title in Vance, no possession in the plaintiffs or any person under whom they claimed, and no sufficient proof of demand of possession. The only witness called in support of this defence was John Lowden, one of the defendants, who said that he and his brother Robert always lived on the property with their parents, both of whom were dead; that there being danger of the place being taken by Martin, he went to Charles Crow, since deceased, and had a conversation with him about the land, and applied to him to pay money to Martin; that Crow consented to pay the money, and was to have interest for it, he (Lowden) having the privilege of repaying the money, but no time was fixed for the repayment; that he did not agree to pay and never paid rent, but was always paying interest. On cross-examination, he said that he went to Crow to get him to take a deed from Martin, and was to pay him interest, and paid a little money at one time and worked for him; that when Robert was working for him he must have known it was on account of the place and must have worked on account of the interest. The evidence of this witness does not weaken, but in my view it materially strengthens the plaintiff's case. He does not pretend to set up any title in himself, or in his co-defendant, in the land in dispute, but in effect admits that when he went to Charles Crow and urged him to obtain a deed of the land, the title thereto was in Martin, and the only discrepancy between his evidence and that produced on the part of the plaintiffs is that he asserts that he was to pay Crow interest on the money paid by him for the land, instead of rent, and did once pay a little money as interest, while the other witnesses positively swear he paid money to Crow on two occasions *expressly for rent*. Of the two statements, I am disposed to believe the latter as the most reasonable, probable and truth-

ful of the two; for it can hardly be supposed that Charles Crow would purchase and pay £100 for the land and allow the defendants to remain in possession for an indefinite period, on a verbal engagement to pay interest on the money and without some security that such interest would be paid. If, then, there is sufficient evidence to show that the relation of landlord and tenant existed between Charles Crow and the defendants, as I think there is, then the defendants are estopped from disputing the title of their landlord, and there was no necessity to prove title in Vance, of which the Sheriff's deed was presumptive evidence, nor was it necessary to show any actual possession in Charles Crow before the relation of landlord and tenant existed.

The first and second ground of defence being untenable, the only remaining question is whether there was a sufficient demand of possession to entitle the plaintiffs to recover. The defendants having remained in possession with the consent of Crow, the legal owner of the premises, could not, it is true, be treated as trespassers without a demand of possession; but holding as they did without any lease in writing, they could in law only be regarded as tenants at will,—see Chap. 83, R. S., Sec. 1, 4th Series,—a tenancy which the owner had a right to put an end to whenever he thought fit. In the exercise of that right a demand of possession in writing was made and served upon the defendants, and that, I think, was all that was necessary under the circumstances of this case to entitle the plaintiffs to maintain the present action. I have great doubt from the nature of the defence whether the defendants were in a position to insist upon a demand of possession, having at the trial repudiated the relation of landlord and tenant, and claimed to hold the possession of the property upon a ground wholly inconsistent with that relation, which of itself dispensed with the necessity of such demand; but as a demand was made, in order to satisfy every requirement, this last ground of defence appears to me as untenable as the rest.

This case bears some analogy to the case of *Doe d. Earl Spencer v. Buckett* 4 Q. B. 601. in which it appeared that the lands in question were conveyed by the Duke of Bedford Earl Spencer, the father of the lessor of the plaintiff, and that

neither the late nor the present earl had been in the actual possession of the land from the time of the conveyance in 1792 down to the time of the trial, being a period of fifty years. It was proved by a witness that his father held as tenant to the Duke of Bedford and to the late Earl for sixteen years, and that he, the witness, then succeeded his father and held for ten years, during which he paid rent to the late Earl; that this witness was then succeeded by a person named Hampton, and evidence was given that defendant, twenty years afterwards, declared that he held as tenant of Hampton. It was also proved that Hampton had previously said to a person employed by the lessor of the plaintiff that he held no property but what he held of Lord Spencer, for which he paid £100. The defendant contended that this evidence was not sufficient to take the case out of the operation of 3 & 4, Wm. IV., Ch. 27; but the learned judge who tried the cause directed a verdict for plaintiff, reserving leave to move for a nonsuit. The verdict was upheld and Lord DENMAN in delivering the judgment of the Court said, "It was shown that Hampton paid rent for land, while he held it, and within twenty years, to the lessor of the plaintiff, and that his declaration was good evidence of that fact."

The defendant, he said, did not pay rent, but he was shown by his own declaration to hold under Hampton and an under-tenant could not be permitted to dispute a title valid as against the person under whom he held. The present case is stronger than that referred to inasmuch as it was positively proved on the part of the plaintiffs that money was paid by one of the defendants to the testator, Charles Crow, then being the legal owner of the land, and that work was performed for him by both of the defendants from time to time within twenty years before the suit was brought *as and for rent of the premises*, shewing that this case does not come within the operation of the Statute of Limitations, Chap. 100, R. S., 4th Series, as it was supposed it did at the trial, and that the plaintiffs' right of entry was not taken away. For these reasons I am of opinion that the plaintiffs are entitled to recover and that the rule *nisi* for setting aside the verdict and entering judgment for the plaintiff must be made absolute with costs.

WOODWORTH v. TROOP, ET AL.

Plaintiff, being a member of the House of Assembly of Nova Scotia, in a speech made on the floor of the House, and while the House was in session, charged the Provincial Secretary, also a member of the House, with having altered and falsified certain public records and grants of the Crown Land Department, after the signature of the Lieut. Governor had been appended thereto. A Committee appointed to investigate the matter reported that they found the charges altogether unfounded and that the evidence produced had completely exculpated the Hon. Provincial Secretary therefrom. A resolution based upon that report was passed by vote of the majority of the House on April 28th, reciting the charge, the investigation and the report of the Committee, and concluding with an expression of the opinion of the House, that plaintiff in preferring such charge without due preliminary investigation, had been guilty of a breach of privilege and that he should be dealt with according to the rules and practice of Parliament. Subsequently, on April 30th, a resolution was passed reciting the charge, &c., and requiring the plaintiff to appear at the Bar of the House, and with the doors open make an apology in terms dictated by the House. Plaintiff having declined to comply with the requirement, a resolution was passed declaring his refusal to make such apology a contempt of the House and requiring him forthwith to withdraw until such apology should be made. Plaintiff having declined to withdraw, a resolution was passed to the effect that he should be removed by the Sergeant-at-Arms and kept excluded until he should signify his willingness to make the apology required by the House. The resolution was at once carried into effect, and plaintiff brought action against the Speaker, the Sergeant-at-Arms and certain members of the majority that carried the resolution.

Held, that the defendant's justification must depend solely on evidence connected with the subject referred to in the resolution, and that evidence of misconduct on the part of the plaintiff on other occasions was irrelevant,—that the House of Assembly, in passing its several resolutions, had in effect adjudicated upon an alleged contempt on the part of the plaintiff in refusing to make the apology required, and in so doing had exceeded its constitutional power, that as there was nothing to indicate that the House had taken action on account of any unparliamentary or disorderly conduct of plaintiff calculated to interfere with the performance of its legislative duties, and as the jury had found, under the charge of the Judge, that the exacting of the apology was for a past offence, and plaintiff was excluded because he would not comply with the requirement, the verdict, which was for the plaintiff, could not be disturbed.

The 32d rule of the House, prescribing that in cases not otherwise provided for, the House shall be guided by the rules, usages and forms of the Imperial Parliament, does not confer upon the Assembly of Nova Scotia the power to punish for a contempt.

The plaintiff in this cause, in the first count of his declaration, set out that the Defendants, the Speaker and certain members and officers of the House of Assembly of Nova Scotia, on the 30th day of April, 1874, and on divers other days, between said 30th of April and the commencement of the suit, assaulted and beat him, and with force and violence ejected and expelled him from the Legislative Assembly, and from his seat in said Assembly.

The second count set out that the plaintiff had been and was a member, &c., and being lawfully in his seat, the said defendants assaulted and beat, and with force and violence illegally ejected and expelled him from said assembly and from his seat therein.

The third count set out that plaintiff, being a member, &c., and being in his place, &c., defendants, on the day, &c., and on divers other days, &c., assaulted and beat, &c., and caused plaintiff to be seized and illegally and wrongfully ejected, &c., and caused the said plaintiff to be kept so ejected and expelled from thence hitherto.

The fourth count set out the cause of action as in previous counts, adding that defendants had continued to keep plaintiff ejected, &c., and had thereby prevented and hindered plaintiff from enjoying his rights and privileges, and discharging his duty as such member.

The fifth count set out that defendants assaulted and beat the plaintiff.

To this declaration the defendant pleaded ten pleas, the first five of which traversed the five counts of the declaration respectively.

The sixth plea, suggesting that all the counts were for the same cause of action, denied that the Plaintiff was a member of the said Assembly, and denied the assault, &c. The seventh plea was as follows:—

For a seventh plea to said several counts, suggesting that they are substantially for the same cause of action, said defendants say that said plaintiff being in his said seat illegally and against the lawful resolution of said Assembly and in contempt thereof, and hindering, obstructing and delaying the business thereof maliciously, and creating a disturbance, and using violent, abusive, disorderly, and unbecoming language in said Assembly on said days and divers other days, one Angus M. Gidney, the Sergeant-at-Arms of said Assembly, requested said plaintiff to depart from said Assembly, whereupon said plaintiff departed voluntarily from said Assembly, which are the alleged trespasses and assaults and not otherwise as alleged, and said defendants, except as aforesaid, did not commit the said several trespasses, and said defendants did not assault and beat the plaintiff, and eject him and keep him ejected from said Assembly as alleged.

The eighth and ninth pleas, in addition to the justification set out in the preceding plea, referred to grounds which were more fully expanded in the tenth and last plea, which was as follows:—

For a tenth plea to the said several counts, suggesting as aforesaid that they are for the same cause of action, the said defendants say that the defendant, Jared C. Troop, was Speaker, the defendant, Angus M. Gidney, was Sergeant-at-Arms, the defendant, James L. Griffin, was Assistant Sergeant-at-Arms, and the other defendants in plaintiff's writ were members, among others, of the Legislative House of Assembly of the Province of Nova Scotia, that the Honorable William B. Vail was at the times mentioned in plaintiff's writ, and had theretofore been a member of the said Assembly, and Provincial Secretary and a member of the Executive Council of said Province: that at and previous to the time in said writ, and until the commencement of the present action, said House of Assembly was in session convened; that previous to the date mentioned in plaintiff's declaration, to wit, on the 26th April, A. D., 1874, plaintiff, in his place in the said House of Assembly, then in session, contrary to the established rules and practice of the House, no motion or question being before said House, proceeded to speak and falsely charged the said Honorable William B. Vail, then present in said House of Assembly, "with falsifying certain public records, viz., the original map of surveys in the County of Guysboro, also the only legal record of lands granted in that County;" said plaintiff then also charged said Honorable William B. Vail "that after the grants had passed, he purposely ordered the name of William Esson to be expunged, and the names of other persons to be interlined in the records, and that this had been done after the grants had passed, after the signature of Governor Doyle had been appended to the grants and the record." The said plaintiff at said time and place called for certain record books from the Crown Land office, and proceeded to say that "those books would not be safe if allowed to remain in the Crown Land office, under the control of said Honorable William B. Vail," charging and implying in his said speech that said Honorable William B. Vail had corruptly altered the public records, and that he would do so again; that during the said sitting, in reply to a speech of the said Honorable William B. Vail, the plaintiff, after reiterating the said charge, proceeded to say that "if it could be proved he had made it without

foundation, no one would be more happy than he would be to make every apology." That after an investigation of said charges, demanded by said Honorable William B. Vail, by a committee chosen unanimously by said Assembly at said sitting, a report was, on the 24th April, 1874, presented to said House then in session, as follows :—

" COMMITTEE ROOM, April 24, 1874.

" The Committee appointed to investigate the charges made by Douglas B. Woodworth, Esq., member for Kings County, on the sixteenth day of April last past, in the House of Assembly, against the Honorable Provincial Secretary, of having altered certain records in the Crown Land office, after the same had been signed by the Governor and Provincial Secretary, beg leave to report that after having fully investigated the charges preferred, we find that said charges are altogether unfounded, and that the evidence produced has completely exculpated the Honorable Provincial Secretary therefrom."

" DONALD ARCHIBALD, (Chairman.)

" THOMAS JOHNSON."

That on said report being presented, said plaintiff again proceeded to speak, and again admitted it was true he had made the said charge of falsification of the records. Said plaintiff also, in his said speech, proceeded to state of the said Assembly, or a majority thereof, that he did not expect fair play from them, and insolently, indecently and maliciously spoke of said majority as " a packed majority ;" and though said plaintiff had reduced said charge to the following words by his sanction and approval: " House of Assembly Committee Room, April 17th, 1874. Met at 9½ a. m. Memorandum of meeting of Committee appointed to investigate the charges made by Mr. Woodworth, member for the County of Kings, on the 16th of April last past, in the House of Assembly, against the Honorable Provincial Secretary, of having altered certain records of the Crown Land office after the same had been signed by the Governor and the Provincial Secretary. Present: Donald Archibald, Thomas Johnson, and Simon H. Holmes. The Committee appointed Donald Archibald Chair-

man ; Simon H. Holmes appointed Secretary *pro tem* ;"—pretended that he had made other charges which had not been investigated, and said plaintiff persisted in repeating said charges. And said report was, after debate, unanimously adopted and entered on the journals of the said House of Assembly, the said plaintiff being present and not calling for a division on the vote thereon ; that after the unanimous reception and adoption of said report by said House of Assembly, at the same sitting another resolution was submitted, of and concerning said plaintiff and the said charge made by him in said House, in the words following : " Whereas, Douglas B. Woodworth, Esq., member for the County of Kings, did in his place in the House of Assembly of this Province, on the 16th day of April instant, charge the Honorable the Provincial Secretary with having altered certain records of the Crown Land Department, after the same had been signed by His Honor the Lieutenant Governor and the said Honorable Provincial Secretary and the Commissioner of Crown Lands, which said charge involved a high crime and misdemeanor : And whereas the said charge has been fully investigated by a committee of this House, and has been ascertained to be utterly unfounded, and the said Provincial Secretary has been completely exculpated therefrom, as fully appears from the report of the Committee adopted by this House : And whereas, the said charge was preferred without due and proper investigation by the said Douglas B. Woodworth, and was accompanied by expressions tending to lead the House to believe that said charge was founded on fact and could be sustained ; Therefore resolved, that this House feel it to be their duty to express the opinion that in preferring such a charge without adequate and sufficient evidence to sustain the same, or the proper and necessary preliminary investigation requisite to the formation of a correct opinion thereon, the said Douglas B. Woodworth has been guilty of a breach of privilege, and that he be dealt with according to the rules and practice of Parliament." That on said last mentioned day, and during a debate on said last hereinbefore recited resolution, and after the said unanimous adoption of said report, plaintiff neglecting to apologize, proceeded to speak in an insulting and indecent manner thereof and of

the persons who had signed the same, being two of the defendants in this suit, and of the House of Assembly who had unanimously adopted said report, and say that "the report was made for partizan purposes by persons who dared not make any other, as they were owned body and soul by the Government." That at an adjourned debate on said last mentioned motion, referring to the said adoption of said report, exonerating the said Honorable William B. Vail by said unanimous resolution, plaintiff proceeded to argue that said Honorable William B. Vail was not exonerated, and addressed insulting words to the majority of the said Assembly, and the said Assembly, charging defendants and others with corrupt motives. That at a further adjourned debate on said last motion herein set out, plaintiff further continued to speak thereon at great length, in a violent, disorderly, insulting and grossly indecent manner, and to reiterate said charge, and still further made insulting, unparliamentary and improper reflections on the character and conduct of the said member, the Honorable William B. Vail. That on the 28th day of said April, after full and ample debate, said last hereinbefore set out resolution was passed by said Assembly, and entered in the journals thereof. That thereupon, on the last mentioned day, the said Assembly, as it lawfully might, ordered and resolved as follows: "That this House is of opinion that Mr. Woodworth, in making the charge against the Provincial Secretary on the sixteenth April instant, viz., of having altered certain records of the Crown Land office after the same had been signed by the Governor and the Provincial Secretary, did so without foundation, and without sufficient evidence to justify him in making so grave an accusation; and, therefore, that Mr. Woodworth do appear at the bar of this House, and with the doors of the said House open, make the following apology:—"Being convinced that in making the charge I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of this House of so serious an offence, I do now apologize therefor to the Provincial Secretary and to the House, and trust to be excused by him and the House for having preferred said charge without sufficient and due consideration." That said last recited resolution was passed by due form of law, and

according to the custom and practice necessary to remove interruptions and obstructions, and to secure the order and decency of debate in said Assembly, and for the self-security and dignity of said Assembly; and plaintiff refused to obey said last mentioned order and resolution, though he had due and ample notice thereof, and was guilty of a wilful contempt of said Assembly, whereupon the said Assembly, on the day mentioned in plaintiff's declaration, ordered and resolved of and concerning said plaintiff and his said refusal, as it lawfully might so do, as follows: "Resolved that the refusal of Mr Woodworth, the member for the County of Kings, to make the apology ordered by the House, is a contempt of this House: Resolved, that this House cannot consistently with its dignity admit Mr. Woodworth to take his seat till he comply with the order of this House, and make the apology dictated by this House, and therefore he is required forthwith to depart from the House until such apology is made." And said plaintiff at the time of the making and passing of said order and resolution was present in said House of Assembly, and had notice thereof, and openly in presence of said Assembly, and in further wilful contempt thereof, and to the obstruction and delay of said business, expressed his intention to disobey, and did disobey the said order and resolution, and remained in violation of the rules, order and practice of said House, and on the day and time of said alleged trespass, was so in contempt of said Assembly in contravention and derogation of the order and decency of debate and deliberation thereof, and thereupon said Assembly, as it lawfully might, ordered and resolved, of and concerning plaintiff and his said acts, contempt, language, conduct, interference with the dignity, functions and good order of said House, and refusal to obey the same, as follows: — "Douglas B. Woodworth, Esq., member for the County of Kings, having this day taken his seat without having made the apology dictated by the House on the twenty-ninth day of April instant, and having refused to retire from the House in obedience to the order of the House, has been guilty of high contempt thereof. Resolved that for such contempt, the said Douglas B. Woodworth be removed from the House by the Sergeant-at-Arms, and be excluded therefrom, until he shall

have signified to the Speaker that he is prepared to make the apology required by the House."

And said plaintiff refused to obey or comply with the said last mentioned resolution, whereupon the Sergeant-at-Arms, the said Angus M. Gidney, and the said James L. Griffin him assisting, in obedience to the orders and requirements of the said Assembly, required the said plaintiff to retire from the said Assembly, that said Angus M. Gidney and said assistant used as little force as possible in said behalf, and the said plaintiff retired from said Assembly, and said acts are the trespasses, assaults and grievances complained of, and the acts complained of were none other than are hereinbefore set forth, and were not the acts of defendant, but of the majority of said Assembly by the resolution aforesaid, and the defendants did not commit the said several acts in said declaration complained of.

On the trial of the cause which took place before McDONALD, J., at Halifax in November, 1875, the defendants established the fact of the plaintiff having made a charge against the Provincial Secretary, as set out in the plea, and put in evidence the report of the committee upon the said charge and the various resolutions and proceedings of the House founded upon that report in the order and connection set out in the plea. A mass of testimony was also taken, bearing upon the allegations contained in the pleas of disorderly and insulting conduct of the part of the plaintiff at the time of making the said charge, and at the several times referred to in the pleas. The ruling of the Court per RITCHIE, E. J., in reference to this class of testimony renders it unnecessary that the evidence upon these points should be referred to at length.

The defendants put in evidence also, the Rules of the House of Assembly, the 32nd of which is as follows:—

"In all cases not herein otherwise provided, the House shall be guided by the rules, usages, and forms of the Imperial Parliament."

The minority report of Mr. Holmes, a member of the Committee that investigated the charge, was as follows:—

I decline to sign the report on the following grounds:—

1st. That it does not indicate the records or documents referred to in the charges preferred by the member for Kings.

2nd. That it does not indicate the condition of the said records and the result of the Committee's inspection of the same.

3rd. Generally; because the report is not so full as the circumstances elicited by the investigation, in my opinion require.

I therefore beg leave to submit the following report :—

The Committee had under their inspection the following documents from the Crown Land Office :—

1st. Twenty-six petitions on which thirty-three grants were issued, numbering respectively from 10152 to 10184 inclusive. These petitions had attached to them orders dated 20th November, 1871, from the applicants, to make out the grants in the name of William Esson.

2nd. The grant book in which the grants issued under the above petition were registered, and which gave the date of issue of the grants as 20th December, 1871.

3rd. The map on which the lands described in those petitions were plotted.

4th. The letter book containing the dates at which the grants had been transmitted from the office to the Registrar of Deeds at Guysborough for registry, the date being the 20th January, 1872.

The Committee examined the following witnesses, who gave their testimony without being on oath: Edwin Fairbanks, clerk in Crown Land Office; W. A. Hendry, Deputy Commissioner Crown Lands; William Esson, Esq.; Samuel Rettie, M. P. P.; Dr. Campbell, M. P. P.; H. J. Cameron, M. P. P. The Hon. Provincial Secretary and Douglas B. Woodworth also made statements. I find that on the said grant book and plan the name of William Esson has been originally inserted in all the grants corresponding with the twenty-six petitions above mentioned; that subsequently by order of the Provincial Secretary the name of William Esson was erased therefrom and the names of the original applicants under the petition substituted; that these erasures were made in the month of January, 1872, but before the grant book had been signed by the Governor and Provincial Secretary.

While, therefore, the weight of the evidence is in favour of

the contention of the Hon. Provincial Secretary, and is not sufficient to sustain the charge of the hon. member for Kings in its entirety, it must be admitted that the appearance of the documents referred to and the statements of some of the witnesses are quite sufficient to raise the suspicion that public documents of an important character had been improperly tampered with and justified the member for Kings in demanding the investigation which has just taken place.

I am also of opinion that the ruling of the majority of the committee excluded evidence which, in my opinion, was essential to a proper understanding of all the facts necessary to a full apprehension of the whole case.

S. H. HOLMES."

The charge to the jury and the incidents connected with the rendering of the verdict are thus reported by McDONALD, J., in his minutes:—

After explaining to the Jury the nature of the action and the pleadings, I said that, although I was inclined to think that the 10th plea was demurrable,—certainly demurrable if the plaintiff's contention was correct,—and although I thought that it would have been better to raise the question of the efficiency of the plea by demurrer and decide it elsewhere, they (the Jury), had nothing to do with that question, and I meant to take their verdict upon the facts independently of that enquiry, which I reserved for the opinion of the whole Court.

I said that undoubtedly the rules of the House, like the resolutions, had been proved, and the justification under those rules stood in the same position as the justification under the resolutions of the House. If sufficient in law, the defendants would have the benefit of both. As I thought this a very important cause, and in order to avoid any doubt or misapprehensions of my charge, I put in writing what I conceived to be the most material part of it and read it to the Jury as follows:

I am not going to say what, in my opinion, the powers of Provincial Assemblies ought to be, as my saying so might have an injurious effect upon your finding; but I am bound to tell you what I believe the law to be on that point.

If the powers of the House of Assembly of this Province were identical with those of the English House of Commons there could be no doubt that the plaintiff in this action would fail.

For many years it was assumed by many of our forefathers that our Assembly did possess such power, and it is not our duty to say, nor yours to consider, how far that impression was created in giving our Legislature that elevated tone and high character which, in days not very long gone by, it undoubtedly possessed. The power was claimed, and in some respects, attempted to be exercised, not only in this Province but in the neighboring Province of New Brunswick and several other Colonies having Legislative Assemblies authorized, like ours, to make laws for the good government of the country; but the occasional exercise of the power, within so limited a space of time in our history extends, would not, alone, give it the force of law. In several cases it was questioned, and the question was finally decided by the Judicial Committee of the Privy Council, whose decisions, in this instance, are binding upon us. Accordingly at the time of the passing of the British North America Act, it was found necessary to insert a clause authorizing the Parliament of Canada to define the powers of the House of Commons of Canada, not however to exceed those of the British House of Commons. The Parliament of Canada has passed such an act, and by virtue of that legislation the House of Commons of Canada possesses, within the Dominion, the same powers as the English House of Commons has in England. This, however, does not extend to the House of Assembly of Nova Scotia, and as far as the powers of that body are in question, we are forced to go back to adjudicated cases and take them for our guides.

In *Kielley v. Carson*, which was a case arising in Newfoundland, it was held by the high authority to which I referred that an Assembly constituted like that of Newfoundland, had the right to protect itself against all impediments to the due execution of its procedure, but it was also laid down as law that the power of punishing anyone for past misconduct, as a contempt of its authority, and adjudicating upon the fact of contempt and the measure of punishment as a judicial b

irresponsible to the party accused, whatever the real facts might be, is of a very different character and by no means essentially necessary for the exercise of its functions by a Local Legislature, whether representative or not. The judgment of the Court in that case goes on to say that all these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish insults and interruptions. This case was followed by another from Dominica, which, although the subject in controversy in it was different, yet was decided upon the principles of the common law which prevailed in the Newfoundland case. The result, then, in my opinion, is that Legislative Assemblies like ours have not, in the absence of express grants, the power to adjudicate upon, nor punish for contempt, but they have the power to remove any obstructions offered to their proper action as Legislative Assemblies during their sittings, because such last mentioned power is necessary for self-preservation and the proper performance of their functions.

If a member will violate good order to the extent of obstructing the legitimate business of the House, the law will sanction that degree of force which is necessary to remove him, and keep him excluded as long as such exclusion may be necessary to ensure the proper working of the business of the Assembly.

You will observe, however, that there is a wide difference between removing a member for the purpose of enabling the Assembly to do its legitimate work and removing him when it is not necessary for that purpose, but merely as a punishment for a contempt in refusing to apologise for a past offence.

As the matter stands, you are to consider whether, on the one hand, turning the plaintiff out at the time and in the manner proved was, in point of fact, necessary on the ground that he was an obstruction to the business of the House, in which case he would have no right of action; or on the other hand, whether or not he was removed, not because he was such an obstruction, but merely for a contempt in refusing to make an apology for a past offence. If you find the latter to be the case, that is, that the exacting of the apology was a penalty for a past offence, and that the plaintiff was turned out merely

because he would not repeat that apology, though not obstructing the business, you ought to give him a verdict.

And now, having given you what I conceive to be the law, let me tell you that as the case stands (without any reference to the questions upon the pleadings, which I reserve for the full Court), I think that the evidence is exceedingly strong to show that when the plaintiff was removed he was not obstructing the business of the House, but that his removal was a punishment for a contempt of the House in refusing to make the apology dictated to him for a real or alleged offence committed about fourteen days previously. When removed he was not misbehaving.

He went out without offering any resistance that was not necessary to show that he did not go voluntarily, and the resolution by virtue of which he was removed, upon the face of it, shows that he was turned out because he was guilty of a contempt of the House in not repeating in the manner prescribed the apology dictated to him.

To many persons the exacting of such an apology as a condition of remaining in the House would be much more of a punishment than a moderate fine or imprisonment, and it is hardly necessary for you to ask yourselves the question, urged by the plaintiff's counsel, whether or not, the more high-minded the man was, the more difficult it would be to repeat such an apology. I think that the House had no legal right to exact such a condition to the plaintiff's remaining in his seat and discharging his Legislative duties.

I will read the evidence and, subject to the legal objections taken, which are not for you but for the full Court, and it may be for a Court of Appeal, and I would recommend you to find a verdict in favor of the plaintiff, with such damages as, under the circumstances, you may think right.

I will give either party, who may desire it, a rule under which the law that I give you may be reviewed, together with the objections taken at the trial and your finding.

I also told the Jury that while a member has a right, in his place, to raise his voice to correct abuses if there is reasonable ground for believing that such abuses exist, he is obstructing the business of the House within the meaning of the law that

I gave them, if he takes advantage of his position, without reasonable cause to represent the existence of abuses merely as a pretext to enable him to vilify or abuse any other member.

I was about proceeding to read the evidence when the counsel on both sides expressed their opinion that it was not necessary to do so, in which the Jury concurred.

At the request of Mr. Weatherbe, made after the Jury retired, I sent for them and told them that, when I said that the House had power to keep a member excluded as long as it was necessary to ensure the proper working of the business of the Assembly, I wished them to understand that the House had the power to expel a member if it were necessary to do so in order to ensure the efficient discharge of its duties.

Mr. Weatherbe asked me to tell the Jury that the minority report signed by Holmes should be excluded from their consideration. I declined to do so. He also asked me to leave to the Jury the question whether the acts done by the defendants were not within the practice and usages of Parliament. I declined to do so.

The Jury, after an absence of over an hour, found a verdict in favor of the plaintiff. Damages \$500.

A rule nisi was taken to set aside the verdict, and was argued in the course of the December Term, 1875-6.

¶ *Hon. Attorney General*, in support of rule. This verdict must be set aside, because all the issues of fact raised were proved on the part of defendants, and uncontradicted. The pleas set up a justification; if it was insufficient the plaintiff was bound to demur. The only question which the Judge could have put to the jury was, were the facts alleged in the pleas proved, the plaintiff having denied them by virtue of the statutory replication. A party, after a certain stage in the pleadings is reached, is bound to elect whether he will raise an issue of law or of fact. The jury here, having an issue of fact only before them, and having found on that issue against the evidence, this verdict cannot stand.

We take also the ground that evidence was improperly admitted and improperly rejected. (*McDonald, Q. C.*, asks

that the particular objections be pointed out.) That is not necessary.

The next point is that the justification here was a sufficient legal defence, the Legislature having acted within its powers. Admitting that the authority of a Colonial Assembly is not as great as that of the House of Commons in England, the Assembly, in this case, had the right to remove and exclude the plaintiff. Cites *Doyle v. Falconer*, L. R., 1 P. C. A., 329, reviewing, and, to a certain extent, modifying the doctrine laid down in *Beaumont v. Barrett*, Moore's P. C. Cases, 59. In that case the distinction is drawn between a power to punish for contempt, which appears to be denied, and the power to take any step, such as removal or expulsion, to prevent an obstruction of the public business, which is clearly admitted. In this case there was no attempt to exercise a judicial power and inflict a *penal* sentence, such as a sentence of arrest and imprisonment would be, but simply what Sir JAMES COLVILLE, in the case cited, defined to be an act of self-preservation, namely, the removal and exclusion of a member obstructing the public business.

The next objection is to the charge of his Lordship who tried the cause, in which he erroneously drew a distinction between the right to remove a member to prevent interruption, and the right to remove as a punishment for a contempt in refusing to make a certain apology. That is not the distinction laid down in the case of *Doyle v. Fulconer*, where the punishment referred to as beyond the power of the Assembly is defined as a *penal* sentence. Had not the House the right to pass a resolution demanding the apology, and was not the plaintiff obstructing the business of the House in refusing to obey that resolution? His Lordship also improperly put a question of law to the jury, in asking them to say whether removing the plaintiff was necessary on the ground that he was obstructing the business of the House in refusing to make the apology, and in asking them to find whether he was removed as a punishment for a past offence. What difference whether the House removed him the day he made the charge, or took time to investigate the charge, and then took action? Had not the House the right to demand an apology? (Mo-

DONALD, J., yes.) Then had they the right, upon his refusal to make that apology, to remove him and keep him excluded. The infliction of a fine of twenty shillings, as a penal sentence, would be beyond the power of the House, but it is impossible to shew that a demand for an apology is a penal sentence. Suppose when the member for Kings charged the Provincial Secretary with conduct amounting to forgery (RITCHIE, Esq. J. Can you point to a case where the House took up a charge against an individual member?) In the reign of Charles I, when Speaker Finch was charged with a crime, the member who made the charge was compelled to apologize. (RITCHIE, Esq. J., He was the head of the House.) He was no more than an individual member.

His Lordship was wrong in telling the jury that plaintiff, when removed, was not misbehaving. He was refusing to obey a resolution of the House. He was wrong also in telling them that the exacting of an apology was a greater *punishment* than the inflicting of a pecuniary fine. *L. R., 3 P. C. A. Cases*, 560. Parliament itself must be the judge of the conduct of its members. The principal reason for the removal was the one charge; but general misconduct was pleaded and proved.

The last point I shall take is with reference to the 32nd of the Rules of House, which was proved to have been long ago adopted, and long acted upon by the House, and which prescribes that in all cases not otherwise provided for, the House shall be guided by the rules, usages and forms of the Imperial Parliament.

J. S. D. Thompson (with whom was *McDonald, Q. C.*) contra. The first answer to the contention that the issues of fact were proved for Defendants is that all the issues were irrelevant and afforded no answer to the declaration. The pleas here were framed in such a way as to prevent a demurrer, although the main points presented by them afforded no defence, and to contend that the issues of fact having been proved for defendants is enough to entitle them to the verdict, amounts simply to this, that a skilful pleader by putting any fact, however irrelevant, upon the record, in a form that is not demurrable, as by concluding a bad plea with a formal denial of the trespass,

so as to make it technically a good plea, would entitle his client to the eventual judgment of the Court.

The contention that Parliament is the sole judge of the matter appears to me to be the point upon which the case turns. If Parliament is the sole judge, that must entirely preclude the plaintiff from bringing this action; but if, on the other hand, Courts of Common Law are ever to adjudicate upon such questions, this case is one that would call for their intervention. The argument for the defendants on this point is based entirely on the history and traditions of the English House of Commons. It has ceased to be contended for many years that any such exclusive right belongs to the House of Commons of England. In the leading case of *Ashby v. White*, 1 Smith's L. C., 104, that question arose and was brought most directly before the Court.

In the course of the argument in *Stockdale v. Hansard*, 9 Ad. & El., 1, it was contended that the case of *Ashby v. White* did not settle any principle as to questions of privilege, that no question of privilege was involved, and that the Houses of Parliament never looked upon that case as interfering with and unsettling the doctrine that Parliament had the exclusive right to deal with such questions. DENMAN, J., refers to that contention, and declares that if it was not unsettling that doctrine and declaring the supreme authority of the common law, then the two Houses of Parliament did not understand it.

That decision establishes, beyond any doubt, the authority of the Courts in England to review and decide questions of privilege. The Courts of Common Law are to decide when Parliament is acting within its jurisdiction. That is the doctrine even with respect to the House of Commons in England, which has by tradition some of the highest privileges that can possibly be conceded to any Assembly. Cites 9 Ad. & El., 78.

In *Potter's Dwaris*, 566, the author reviews almost every case in the British House of Commons touching the question of privilege, from the earliest times down to the present.

It was contended in a case there cited that the Legislature inherited all the rights of the House of Commons. The case would have been tenfold stronger in view of the more recent authorities, by which it is shown that Colonial Legislatures,

and by analogy State Legislatures, never inherited and do not possess any of the rights and immunities of the House of Commons at all. The argument in that case proceeded on the assumption that they did. Cites *Potter's Dwarrris*, 601, 567, 596.

The case of *Doyle v. Falconer* is the case of a member present in Parliament, dealt with by Parliament itself for a contempt within its walls. It is a case of so extreme a character that, if the authority of the Legislature to adjudicate upon a contempt could be upheld in any case it would have been upheld in that case. Falconer had exhausted his privilege of debate, and made all the speeches he was entitled to make. He then rose a third time to speak, and, being called to order, used offensive language towards the Speaker, (not, as in this case, making a charge against a public officer, which the House admitted was a proper subject of investigation). Action was taken on the case instantly, and he was committed to jail. The Court decided that that was beyond the authority of the House, and the decision is not simply as to the right to commit, but as to the power of the House to adjudicate.

In *Gossard v. Howard*, 10 Q.B., 411, it is shown conclusively, as it had been stated in argument often before, that with respect to superior Courts of Common Law, jurisdiction is presumed, and acts of the Court are presumed to be done, not only within their jurisdiction, but according to the acts and rules governing those Courts; but with respect to other tribunals, whether statutory tribunals or otherwise, they are bound to show that they have acted within the scope of their jurisdiction.

It is argued that the 32nd rule of the House has provided that the rules of the Imperial Parliament shall be observed in cases not otherwise provided for. The case of *Stockdale v. Hansard* meets that argument exactly. In that case the judges said that to argue that the House of Commons declared that they had the authority drawn in question in that case would be the same as, on the investigation of the jurisdiction of any inferior Court, to cite the mere declaration of the Court that it has jurisdiction. They say, further, that if a jurisdic-

tion is to be conferred it must be by the act of the three branches of Parliament.

In *Doyle v. Falconer* the question arises, what is a judicial deliberation and what is not? In the case now before the Court the expulsion of the plaintiff was a purely judicial proceeding. It was the infliction of a penalty for a past offence. This is not the case of an insult offered by one member of Parliament to another, so gross as might possibly lead to a breach of the peace, where it would be proper for the House to restrain the offending member by insisting on an apology, with the alternative of exclusion from the House. The House never could have regarded this as a case of that character at all. The plaintiff made a charge against a member of the House. If the charge was true, the making of it was one of the duties that he was sent there to perform. The House so far from treating it as a contempt, which should be punished on the spot, acquiesced in the principle that it was their duty to entertain the charge and investigate it. They appointed a committee before whom the matter was enquired into and witnesses examined. A majority and minority report were brought in, and it was only upon the adoption of that report, arrived at after a careful examination and scrutiny of the evidence, that the House decided that the making of the original charge was an offence. They decided that it was a contempt because it was made without proper foundation. To determine that question, whether the charge had been made upon a proper foundation or not, required a judicial investigation. The investigation of the charge was a judicial act and the result of that judicial deliberation was the exclusion of the plaintiff from the House. Therefore, the case comes exactly within the principle laid down in *Doyle v. Falconer*. The punishment for having made the charge in this case was the result of a judicial inquiry, and was a judicial act, if ever there was one.

It is argued that this charge was a contempt of the House, for which the House had a right, at the instant it was made, to require an apology, and that if the House had the right then it undoubtedly had an equal right to deliberate as to the circumstances of the matter, and pronounce the same adjudication

after deliberating that it had the right to pronounce at the moment. Can any weight be attached to that argument, strong as it appears at first sight, when we consider that the resolution excluding the plaintiff does not refer to the charge at all? It sets out that the plaintiff has taken his seat without having made the apology dictated by the House, and has *thereby* been guilty of a contempt of the House, for which it is resolved that he be excluded until he signify to the Speaker that he is ready to make the required apology. It was upon that ground that the plaintiff was assaulted and turned out of parliament. The argument of the hon. Attorney General was that the making of that charge was an obstruction of business for which the House was justified under the case of *Doyle v. Falconer*, in excluding the plaintiff. The answer to that argument is that it was not for that obstruction, if any, at all, but for the refusal to make the apology, and for no other reason, that the plaintiff was eventually excluded from the House.

But it is argued that the refusal to make the apology was an obstruction of the business of the House. I answer, nothing of the kind is stated in the pleadings. The pleadings charge the plaintiff with violent language, etc. But they nowhere allege, nor is it anywhere proved that the refusal to apologize was an obstruction of the business of the House. Even if the defendants could ask the Court to come to the conclusion that his remaining there was an obstruction, it is not such an obstruction as is contemplated in the case of *Doyle v. Falconer*. That was an open violation of the decency of the House, of which the House was bound to take notice.

McDonald, Q. C.—The plaintiff in this case made certain charges in good faith against an officer of the House of which he was himself a member. I am glad that my duty to my client does not oblige me to say that the charges were well founded, but the question is whether they were made in good faith or not, and how the House of Assembly dealt with them. They in the first place recognized the right of the plaintiff to make the charges and to have them duly investigated. An investigation took place and there was a report presented and

adopted. The plaintiff had said, when making the charges, that he would apologize if he was wrong, but he never had an opportunity given him to apologize without doing what would degrade him as a man and subject him to the contempt of the country. An apology was dictated to him by the House in which he was made to admit that he was a liar, a slanderer, and a dishonorable man. No wonder such a sentence has been spoken of as more degrading than imprisonment. The plaintiff never refused to express his regret to the Provincial Secretary. But the moment the report was made the majority of the Legislature, apparently moved by political hatred towards the plaintiff, dictated to him an apologetic statement which it would have been a falsehood for him to have made, and he refused to make it. There is nothing in any of these resolutions to show that the refusal to make that apology was treated as an obstruction of the business of the House. As soon as the report was adopted Mr. Morrison moved a resolution, reciting the charges against the Provincial Secretary, the investigation and report of the committee, and that the plaintiff in preferring such a charge, without due and proper investigation, had been guilty of a breach of privilege. No opportunity was ever given to the plaintiff to negative the assertion that the charge had been made without due investigation. That point was never inquired into by the Committee at all, or if so, only incidentally.

The next resolution that was carried by the House was a resolution requiring the plaintiff to appear at the Bar of the House, with the doors open, and make an apology, the terms of which were dictated by the House, and which admitted, not only that the charge was unfounded, but that it had been made without sufficient and due consideration. There was nothing said in this or in any of the resolutions passed by the House, of the violent language and irregular conduct, or the obstruction of the business of the House, upon which the defendants now seek to justify the expulsion. There is not a single word in the evidence to show that the plaintiff when assaulted was not sitting in his place ready to proceed with the business of the country. The plaintiff, no doubt, when these oppressive resolutions were adopted, used warm language,—language

that was perhaps to be regretted, but which was nevertheless perfectly justified by the circumstances of the case, and by the example of the best and foremost men that ever sat in the House. If there could be anything that would justify the use of warm or even violent language, surely it was the action adopted by the House in this case.

The first argument of the learned Attorney General was that the issue of fact had been proved for the defendants; but surely I have a right to inquire into the character of the evidence received upon which those issues were found. One of the rules of the House is that when any member violates the order of the House, he should be called to order by the Speaker, and dealt with according to the rules of the House. I submitted evidence that the plaintiff had never been called to order except on two occasions. There is no proof that during the whole of those exciting discussions he was ever called to order except upon two occasions, and that fact is shown by the Speaker himself, who was examined.

Cites *4 Moore P. C. C.*, 63, *11 Moore, P. C. C.*, 347, and closes by referring to the objections taken to various portions of the evidence.

Weatherbe in reply. The plaintiff's counsel has rested his whole case on the contention that the proceedings of the House of Assembly were an adjudication upon a contempt. While there is a constitutional question as to the rights of a legislative assembly, and while there may be a distinction drawn between the legislatures of different colonies, this case is not necessarily to be decided on that argument at all. We have raised from the first—and asked the plaintiff to answer—a question with regard to pleading which comes up constantly in the courts as to trespass to the person, justification and replication. That is one of the main difficulties on the part of plaintiff. All that is said in reply is that a skilful pleader might entitle his client to judgment. The Court will give judgment to the party entitled to it on the record. This is an action for trespass to the person. The language describing the plaintiff as a member of the House of Assembly is only descriptive. A man may be turned out of a vestry meeting or a church for improper conduct, and the same rule applies to the

House of Assembly, even if judicial powers are denied to that body.



Here there are special pleas of justification. What comes then? If there is no replication, there is a simple traverse raising an issue of fact. Every matter pleaded has been replied to and as distinctly, clearly, and positively denied under our statute as if replications of actual denial had been filed and served. Now, is the Judge at *nisi prius* to be called on to take the case out of the hands of the pleader and plead for the party, or to take evidence of a confession and avoidance and make a case for him. The judge has one sole duty, and that is, to put to the jury the question raised by the parties themselves. 4 *Foster & Finlayson* 440. The plaintiff has a right to have a confession and avoidance by a replication put on the record, if that is really his position in Court, by amendment.

The Court has been told that there is a distinction between the Imperial Parliament and Colonial Legislatures. That is true, yet the authorities give some power to the Colonial Legislatures. They have such powers as are necessary to self-preservation and the preservation of their own dignity. It may be said that we are estopped by the evidence, which shows that this plaintiff was turned out simply and solely on a certain resolution. Was he? It may have been the intention to put him out on this resolution, but I think there is no evidence from the first to the last to show that he was put out on the resolution, and plaintiff's counsel brought out the only item of testimony on the minutes in reference to that subject. The Sergeant-at-Arms says: "I received orders from the Speaker."

One of the counsel for plaintiff says, you waited too long before taking action on the affair. The other says that the plaintiff never had a moment's time to apologize. The dignity and usefulness, and the purposes for which the Assembly exists, would all be lost if such conduct as this plaintiff was guilty of were tolerated. But we are told that our resolution shows that we did not eject him for those reasons at all, but that we did it as a judicial matter, and that we should have put him out *instantly*. That seems absurd. It is true enough we could not imprison him or, in a sense, punish; but in the case

of *Doyle v. Falconer*, which is relied on by plaintiff's counsel, the Court held that a punishment could be inflicted in one sense of the word. It is merely a play upon words to say that the judgment does not warrant a punishment, but simply an exclusion from the House. The English judges go upon the ground that there must always be a remedy. They do not leave a colonial legislature without its ample remedy. Let it be conceded that no member, for instance, ought to get up and refer to another's personal cleanliness and piety, or to use the language which it is in evidence that the plaintiff here used towards his fellow-members in the House of Assembly, without being liable to removal. (Mr. Weatherbe here alluded to the successive steps taken previous to the exclusion of the plaintiff from the House—the insolent and inexcusably vulgar language used by the plaintiff in the course of the discussions that took place, the undertaking of the plaintiff, when making the charge against the Provincial Secretary found to be untrue; the finding of the Committee, the refusal of the plaintiff to apologize, and the repeated and persistent efforts to annoy members.) Was not that an obstruction of the business? The House must do something for self-preservation. They must either put out the offender *instanter* or give him an opportunity to apologize. He was led out in the most gentle manner. The law laid down in the English cases gives the House the power to call in a policeman, if need be. The apology was framed by the House itself, according to universal custom. It was the mildest apology that could be dictated, and was in the very words in which the member stated that he would apologize. Plaintiff had been guilty of conduct which, the Court has here stated, went beyond the bounds of decency, and the Legislature was bound to do something for the preservation of its own dignity. I do not think the Court will hold that the House could proceed under the fire of such tongue as plaintiff's. Could this Court proceed? Removal was necessary. Suppose a member sat in the House who was physically unfit to sit with gentlemen, what course would the House have but to put him out, unless he purged himself? Every member must preserve his personal decency. The case here is strictly analogous in principle. But we are told that there is not

enough in the resolution to cover the facts upon which we rest the defence of the House of Assembly. That is purely a technicality. We have, under the pleas, put the whole facts of the case in proof to show that that resolution for the removal of the offending member was justified in view of his conduct. The cases cited for the plaintiff do not show that the House cannot investigate a member's conduct. There is not a word of that. They simply show that the House cannot commit for a contempt. The resolution for the exclusion of the plaintiff follows the very wording of the judgment in the Privy Council.

We have pleaded, still further, that what was done was done under the rules and usages of the House of Assembly. We put the evidence of that before the jury, that the rule justifying the proceedings of the House in this case had been adopted by that member himself. Plaintiff says, I admit there was such a rule, but it was *ultra vires*? I maintain that if he wished to contend that the rule was *ultra vires* he was bound to put such a plea on the record. The verdict, as it now stands with the pleadings, is that there was no such rule at all. If there is anything in the rules of pleading at all, a plea such as we have set up here must be met by a plea of confession and avoidance.

Evidence was admitted that should not have been. There was no plea to justify the admission of the minority report. It probably increased the damages. We could not have put in the majority report without putting it on the record, and how can the plaintiff get in an *ex parte* statement of Mr. Holmes', which is all that the minority report amounts to, and that without pleading it.

Cites, as to the whole case, 7 Bing., 305, 9 Bing., 727, 13 M. & W., 781, 2 B. & C., 699, 8 El. & B., 8, 2 B. & Ad., 663.

RITCHIE, EQ. J., now, (Dec. 13, 1876), delivered the judgment of the Court:—

This action was brought to recover damages against the defendants, the Speaker and certain members of the House of Assembly of the Province, together with the Sergeant and Assistant Sergeant-at-Arms of that body, by the plaintiff, a member, for having assaulted and with force and violence

ejected and expelled him from the House and his seat therein, and causing him to be kept expelled therefrom, and preventing him from enjoying his rights and privileges as a member of the Legislature ; and a verdict having been obtained by him with \$500 damages, the defendants now seek to have the rule *nisi*, which they have taken to set it aside, made absolute.

It appears from the evidence which was given in support of the defendant's pleas of justification, that on the 16th of April, 1874, the plaintiff, in his place in the House of Assembly, charged Mr. Vail, one of the defendants, then being Provincial Secretary and a member of the House, with having altered and falsified certain public records belonging to the Crown Land Office, consisting of grants, maps and records of grants, after the signature of the Lieut.-Governor had been affixed to the grants, and he, at the same time, intimated that he would not consider them safe if Mr. Vail had access to them. For this he was not called to order, but Mr. Vail asked for a committee to investigate the charges, and a resolution was adopted appointing a committee of three members for that purpose. On the 24th of April a report was made by two of them as follows:—"The committee appointed to investigate the charges made by Douglas B. Woodworth, Esq., member for the County of Kings, on the 16th day of April last past, in the House of Assembly, against the Hon. Provincial Secretary, beg leave to report that after having investigated the charges preferred, we find that said charges are altogether unfounded, and that the evidence produced has completely exculpated the Hon. Prov. Secretary therefrom;" which report was received and adopted by the House, and thereupon the following resolution was moved and seconded:—

" *Whereas*, Douglas B. Woodworth, Esq., member for the County of Kings, did, in his place in the House of Assembly of this Province, on the 16th of April, instant, charge the Honorable the Provincial Secretary with having altered certain records of the Crown Land Department after the same had been signed by His Honor the Lieut.-Governor and the said Hon. Provincial Secretary, and the Commissioner of Crown Lands, which said charge involved a high crime and misdemeanor ;

"And whereas, the said charge has been fully investigated by a committee of this House, and has been ascertained to be utterly unfounded, and the said Provincial Secretary has been completely exculpated therefrom, as fully appears from the report of a committee adopted by this House ;

"And whereas, the said charge was preferred without due and proper investigation by the said Douglas B. Woodworth, and was accompanied by expressions tending to lead the House to believe that the said charge was founded in fact, and could be sustained ;

"Therefore resolved, that this House feel it to be their duty to express the opinion that in preferring such a charge, without adequate and sufficient evidence to sustain the same, or the proper and necessary preliminary investigation requisite to the formation of a correct opinion thereon, the said Douglas B. Woodworth has been guilty of a breach of privilege, and that he be dealt with according to the rules of Practice of Parliament."

Which resolution was passed by the House on the 28th of April, and the House, on the 30th of April, passed the following resolution :—

"Resolved, that this House is of opinion that Mr. Woodworth, in making the charge against the Hon. Provincial Secretary, on the 16th of April, inst., viz. : of having altered certain records of the Crown Land Office, after the same had been signed by the Governor, and Prov. Secretary, did so without foundation, and without sufficient evidence to justify him in making so grave an accusation, and therefore, that Mr. Woodworth do appear at the Bar of the House, and with the doors of the said House open, make the following apology, viz. : Being convinced that in making the charge I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of this House of so serious an offence, I do now apologize therefor to this House, and trust to be excused by this House for having preferred such a charge without sufficient and due consideration."

And Mr. Woodworth, in his place in the House, having declined to make the apology dictated in that resolution, the following resolution was adopted by the House :—

"Resolved, that the refusal of Mr. Woodworth, the member for the County of Kings, to make the apology dictated by this House, is a contempt of this House.

"Resolved further, that this House cannot, consistently with its dignity, admit Mr. Woodworth to take his seat until he comply with the order of this House, and make the apology dictated by this House, and therefore he be required forthwith to withdraw from this House until such apology be made."

The plaintiff was in the House when this resolution passed, and having declined to withdraw, the following resolution was adopted :

"Douglas B. Woodworth, Esquire, member for the County of Kings, having this day taken his seat without having made the apology dictated by this House, in the resolution of the 28th day of April, instant, and having refused to withdraw from the House in obedience to the resolution just passed by the House ;

"Therefore resolved, that the said Douglas B. Woodworth be forthwith removed from the House by the Sergeant-at-Arms, and be excluded therefrom until he shall have signified, to His Honor the Speaker, that he is prepared to make the apology required by the House."

And thereupon the plaintiff, in pursuance of such resolution, was removed from the House by the Sergeant-at-Arms and his Assistant, two of the defendants.

The defendant's justification must depend solely on evidence connected with the subject referred to in these resolutions. The only grounds of complaint against the plaintiff, for which he was expelled from the House, were the charges he made against Mr. Vail, and his declining to make the apology dictated to him ; and, therefore, all evidence adduced by the defendants at the trial of alleged misconduct on the part of the plaintiff, on other and different occasions in relation to other persons, cannot justify the act complained of, if it is not justifiable on the grounds set out in the resolution, and in my opinion all such evidence was irrelevant to the issue, and ought not to have been received, as it constituted no justification, though it might diminish the amount of damages :—It was certainly calculated to have that effect, and it could not be

legitimately introduced for that purpose. We have, therefore, to consider whether the expulsion of the plaintiff from his seat in the House was justifiable on those grounds; in other words, whether the House of Assembly of this Province has the power of passing the resolution for the causes therein assigned, and enforcing them against the plaintiff as they have done. The Attorney General, on the part of the defendants, took the broad ground that the House of Assembly in dealing with one of its members in relation to his conduct within it, was not amenable to any other tribunal for its act; that it possessed the power of punishing him for a contempt, and that what constituted a contempt was for the House alone to decide, and he claimed for it the like powers and privileges as are possessed by the House of Commons of Great Britain. This position is wholly untenable; no inherent right to such powers can, with any reason, be claimed for a Provincial Legislature, since the decision of the Privy Council, in *Kielley v. Carson*, 5 M. P. C. C., 63 and *Fenton v. Hampton*, 11 M. P. C. C., 347, which ignored such powers in a Colonial Legislature, and held that it possessed only such powers as were reasonably necessary for the proper exercise of its functions; and that the law and custom of Parliament applied exclusively to the Lords and Commons of England; and the case of the *Speaker* of the Assembly of *Victoria v. Glass*, L. R., 3 P. C. C., 560., cited and much relied on by the Attorney General, is entirely consistent with this doctrine and confirmatory of it, in cases where as in this Province, no special powers had been conferred on the Legislative Assembly as they had been in Victoria, the Assembly of that Colony having been endowed by statute with all the privileges and powers enjoyed by the British House of Commons.

Though not entitled to the powers and privileges to the extent contended for, it is obvious that colonial legislatures must be clothed with authority to repress disorderly conduct during their proceedings, and to resort to such means as may be necessary to effect that object, and enable them to perform their legislative duties; and in *Doyle v. Falconer*, L. R., 1 P. C. C., 328, this question came up. There the offence consisted in a member of the House of Assembly of Dominica when

called to order by the Speaker for transgressing the rules of the House, insulting him very grossly, saying, among other things, that he was a disgrace to the House; whereupon the House resolved that he had been guilty of a high contempt of the House, and that he should be held in such contempt till he should have apologized. And upon being called upon to make the apology by the Speaker he refused, and said to him, among other things, "you were expelled for robbery, the minutes of 1845 can show it." In consequence of this the House resolved that being in contempt, and having been called upon to apologize, and having refused to do so, and having, while so in contempt, interrupted and obstructed the business before the House, he should, for his disorderly conduct and contempt, be taken into custody, and committed to gaol during the pleasure of the House.

If that House had possessed the power of punishing one of its members for a contempt, no fault surely could have been found with its exercise in such an aggravated case as this. But the Court held that it had no such power, and that it had acted illegally. At the same time the Court recognised, in such a body, the right of protecting itself against the disorderly conduct of a member, so as to secure order and decorum in debate, and that resort might be had to his removal, or even expulsion, if he obstructed its proper action during its sittings, as that was necessary for its self-preservation.

In the light of these decisions, the question for us is whether the removal of the plaintiff, under the circumstances of this case, was necessary to enable the House properly to perform its functions, or I should rather say, whether the jury were justified in finding, as they have done by their verdict, that there was no such obstruction to its business as to justify his removal.

Withdrawing from our consideration, as I think we are bound to do, the large amount of irrelevant matter introduced with the pleas, and received in evidence, to which I have already alluded, it is difficult to see on what ground it can be contended, that the plaintiff caused any obstruction to the House in the performance of its duties. His alleged offence, in the first instance, consisted in his having made a charge

against a member of the House, and a member of the Government, the subject matter of which was one proper for the consideration of the House, and which he had a right to bring to its notice. And if this were not done in a proper manner, and if in doing so he used language which was deemed unparliamentary, or was disorderly in his conduct, he should have been called to order at the time, and the matter disposed of as provided for by the 12th and 13th rules of the House, in evidence, which direct the mode of proceeding in such cases. But the complaint against the plaintiff was not that in making the charge against Mr. Vail, he did so in an unparliamentary manner, but simply that he made a charge against him which involved a high crime and misdemeanor, and thereupon, investigation having taken place, the House, coming to the conclusion that it was unfounded and made without sufficient evidence to sustain it, and without the necessary preliminary investigation, resolved that he had been guilty of a breach of privilege. Assuming this to be all true, it is somewhat difficult to perceive how the conduct of the plaintiff could be held to be a breach of privilege. Certainly there is nothing alleged against him which rendered his removal necessary to enable the House to conduct its business or perform its functions as a legislative body, however blameworthy and subject to censure he may have been, in not having more fully investigated the subject before making the charge. The House, having come to this decision, proceeded to adjudge that for his offence he should make an apology, in a form dictated to him, which he declined to do, and this is the important point of the case, for it was for this refusal that he was adjudged guilty of a contempt of the House, and was required to withdraw, and on his refusal to do so, was removed from his seat and excluded from the House till he should express to the Speaker his willingness to make the required apology. In effect, having adjudicated on the question and decided that the plaintiff had been guilty of contempt, the House punished him for such contempt by removing him from the House, and depriving him of his privileges as a member till he should purge himself of the contempt by making the prescribed apology; and the

jury have found under the charge of the Judge that the exacting of the apology was for a past offence, and the plaintiff was turned out of the House because he would not repeat it, though he was not then obstructing the business of the House, and I do not see how, under the evidence, they could have arrived at any other conclusion. Indeed there is nothing whatever to indicate that the House took the action it did on account of any unparliamentary or disorderly conduct on the part of the plaintiff which was calculated in any way to interfere with the House in the performance of its legislative duties.

I have omitted to refer to a position taken at the argument, by the counsel for the defendants, that though the House might not have had an inherent right to punish for a contempt, yet, that under the rules regulating the practice of the House, the right had been acquired. There is no ground for such a contention. The rule referred to, the 32nd, in terms confers no such power, it merely provides that in cases not provided for in those rules, the House is to be guided by the rules, usages and forms of the Imperial Parliament, which can only be held to mean in the performance of its duties, and the exercise of such rights and privileges as it possessed; but if by the express terms of the rule all the right, and privileges of the Imperial Parliament had been conferred on the House, it would have been inoperative, as these could only be conferred by the whole legislature and not by one branch of it. Objection was taken to the charge of the learned Judge who tried the cause, but on a careful consideration of it, the law was, in my opinion, correctly stated, and the case properly placed before the jury.

The only other point urged by the defendants' counsel related to the improper reception and rejection of evidence, and, though many objections appear to have been taken in the course of the trial, few were insisted on at the argument. That which was principally relied on, was the reception in evidence of what is called the minority report. As to the rest, no grounds were shown leading to the conclusion that the defendants had any reason to complain of the rejection of any of their evidence, or the reception of improper evidence on

the part of the plaintiff. As regards the report I have referred to, it does not appear to have been very material evidence. The document contains the reasons why the dissentient member of the committee appointed to investigate the charge against Mr. Vail did not concur in the report of the majority, and it was returned to the House, by the chairman of the committee, with his report; it was thus brought to the knowledge of the House before any action was taken against the plaintiff, and if the report was received in evidence, at the instance of the defendants, I see no reason for its rejection, as it formed part of the *res gestæ*; but if the view I have taken of the law be correct, that in their proceeding against the plaintiff the House had acted *ultra vires*, its reception should not affect the verdict, for, whether received or rejected, it ought not to have been other than it was, and by our Practice Act, Sec. 211, it is provided that no new trial shall be granted, on account of evidence improperly received at the trial, if in the judgment of the Court there be other evidence sufficient to sustain the verdict. I think, therefore, that the rule *nisi* for a new trial should be discharged.

DESBARRES, J. I agree with the learned Equity Judge that the verdict in this case ought not to be disturbed. To my mind the cases decided in the Privy Council to which the learned Judge has referred, and which I have carefully read, are decisive on the important point in this case, as to whether the House of Assembly of Nova Scotia possessed the powers inherent in the House of Commons of the United Kingdom of punishing for contempt. It is clear, I think, that it does not. If any such power had been possessed by a Colonial Assembly upon which, like our own, it had not been expressly conferred by Act of Parliament, there never was a case in which there was greater reason to exercise it than in the case of *Doyle v. Falconer*, L. R., P. C. C., 328, where a member of the House of Assembly of Dominica was called to order for using the most gross and insulting language to the Speaker, for which it was resolved that he was guilty of High Contempt of the House, and required to make an apology, and having refused to do so, and while in contempt obstructed the business of the

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House, he was committed to goal during the pleasure of the House, and yet it was held that although the House had the power of protecting itself against the disorderly conduct of a member by removal, or even by expulsion, it had acted illegally by committing the offending member to gaol. In the present case, it is true, the plaintiff was not committed to gaol, but he was pronounced to be in contempt for having, in his place, made a charge against the Provincial Secretary of that day, then a member of the House of Assembly, for which he was not called to order, on whose motion a committee to investigate this charge was appointed by the House.

That committee having investigated the subject matter of the charge, reported that the charge was unfounded, and that the evidence produced had completely exculpated the Hon. Prov. Secretary therefrom. Upon a report like this, so completely vindicating the character and honor of that gentleman from the imputation made against him, it might have been expected, and probably would have been as well that the matter would have ended there.

But two days after the report was received and adopted by the House, viz., on the 28th of April, a resolution was passed reciting the charge, that it had been ascertained to be without foundation, and pronouncing it to be a high crime and misdemeanor, that it had been preferred by plaintiff without due and proper investigation, and that in preferring the charge without sufficient evidence to sustain it, the plaintiff was guilty of a breach of privilege, and that he be dealt with according to the rules and practice of Parliament. On the 30th of April another resolution was passed by the House, to the effect that it was the opinion of the House that the plaintiff, in making the charge of the 16th April, which was recited, had done so without foundation, and without sufficient evidence to justify him doing so, and that therefore the plaintiff should appear at Bar of the House of Assembly and make the following apology, viz.: "Being convinced that in making the charge, I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of this Assembly of so serious an offence, I do now apologize to the House for having made such a charge without sufficient and

due consideration." The plaintiff having declined to make that apology, another resolution was passed by the House of Assembly to this effect: "That the refusal of Mr. Woodworth, member for the County of Kings, to make the apology dictated by the House, is a contempt of this House. Resolved further, the House cannot consistently with its dignity admit Mr. Woodworth to take his seat until he comply with the order of the House and make the apology dictated by the House, and that therefore he be requested forthwith to withdraw from the House until such apology be made." The plaintiff, who was present, having declined to withdraw, the final resolution was passed as follows: "Douglas B. Woodworth, the member for Kings, having this day taken his seat without having made the apology dictated by this House in the resolution of the 28th April, inst., and having refused to withdraw from this House in obedience to the resolution just passed by the House, Therefore resolved, that the said Douglas B. Woodworth be forthwith removed from this House by the Sergeant-at-Arms, and be excluded therefrom, until he shall have signified to his honor the Speaker that he is prepared to make the apology required by this House." For refusing to withdraw the last order of the House was enforced through the Sergeant-at-Arms and his assistant, and the plaintiff was removed from the House, while, as it appears, he was quietly sitting in his seat, and offering no obstruction to the proceedings of the House. And here the real question in the case arises, viz.: was the plaintiff dismissed from the House for refusing to make the apology dictated to him, for which he was pronounced to be in contempt, or for obstructing the proceedings of the House, and disorderly conduct? The Jury, under a charge of the learned Judge who tried the cause, in which, I think, the law applicable to the case was rightly laid down, have found that the plaintiff was dismissed for what was pronounced to be a contempt, viz.: for refusing to make an apology for a charge preferred against the Provincial Secretary, which, when made, was not considered to be a breach of privilege, and for the investigation of which the House had deemed it proper to appoint a special committee, who had reported upon it.

The jury having therefore found that he was removed for

a past offence, for which, according to my apprehension of the law, the House of Assembly did not possess the power of expulsion which they exercised, I think the rule for setting the verdict aside ought to be discharged.

MCDONALD, J. In my charge to the Jury who tried the cause, [see *ante*, page 9] I fully stated the view which I then took of the law, and it is entirely in accord with the opinion of the learned judges, the Judge in Equity and Mr. Justice DesBarres.

Although I have given much consideration to the case, since that time, my opinion is not changed, and I think the rule *nisi* for a new trial ought to be discharged.

WILKINS, J., delivered the following dissentient opinion:—

Before entering on a consideration of this case, I shall briefly notice the change which judicial opinion with regard to the powers of Colonial Legislative Assemblies to punish for contempt has undergone in England. In the case of *Beaumont v. Barrett*, decided by the Privy Council in the year 1836—a case which was, indeed, marked by the feature of a proved usage for a considerable period—it was, nevertheless, decided, in accordance, as was then thought, with an opinion held by Lord ELLENBOROUGH, in *Burdett v. Abbott*, and in perfect harmony with principles judicially recognised by the Supreme Court of the United States of America, that the power to punish for a contempt committed against a legislative body was a power inherent in every Legislative Assembly that possessed supreme legislative authority, whether it were a contempt which directly obstructed the due course of proceeding, or one that merely had a tendency to produce that result. In that case the Court considered a power to exist in the Legislative Assembly of Jamaica to imprison for a contempt consisting of the publication of a libel on the House without the walls in which it held its deliberations.

The Supreme Court of the United States, in *Anderson v. Dunn*, reported in 6 Wheaton 204, decided that the House of Representatives had by necessary implication, in other words, by the Common Law, a general power of punishing and committing for contempts, although the Constitution had ex-

pressly conferred upon it a power that was limited to the punishment of contempts when committed by its own members. The principle of the decision in *Beaumont v. Barrett* was repudiated as unsound by the Privy Council in its later opinion pronounced in *Kielley v. Carson*. The Supreme Court of the United States, however, does not appear to have ever reversed or modified its decision. In this connection it may be observed that the assumed power exercised by the House of Assembly of Nova Scotia, in the case before us, was within the limits of that power conferred on the House of Representatives by the Constitution of the United States, and was also within the limits of the powers at common law, recognised by the Federal Court in *Anderson v. Dunn*. And yet, that same power which was declared in the last mentioned case to exist under the common law, in relation to the House of Representatives of the Union, has been judicially pronounced by the Privy Council in England, in *Doyle v. Falconer*, L. R., 1 P. C. C., 328, not to have that foundation in regard to a British Colonial Legislature. That case decided that the Legislative Assembly of Dominica did not possess the power of punishing a contempt, even if committed in its presence, and by one of its own members.

By that decision, so far as it necessarily extends, we are, of course, bound; and were the case under present review a case in which the Legislative Assembly of Nova Scotia had punished judicially a contempt that had been committed in its presence, and by one of its members, *Doyle v. Falconer* would govern it. I think it is not that case; and, therefore, before considering this case, I venture, with profound respect for the high Court that decided the former one, to offer a few observations on the reasoning by which the Lords of the Privy Council appear to have reached the conclusion arrived at in *Doyle v. Falconer*. I am not so presumptuous as to question the conclusion itself. I may add, also, that nobody can entertain a higher sense than I do of the dignity, the impartiality, the learning and the wisdom of the Judicial Committee of Her Majesty's Privy Council. We hear a good deal of "autonomy," just now, in relation to the absorbing question of the day. I trust the day is far distant when Nova Scotia

will have an "autonomy" that will make its highest Court independent of the control of the high tribunal referred to.

When so enlightened a court as the Supreme Court of the United States recognised, as founded on the common law alone, a right inherent in a particular Legislative Assembly, which has not even now attained so great an age as that which marks the continued existence of the House of Assembly of Nova Scotia, a right which our own Supreme Court of Appeal has judicially declared not to have that foundation, in relation to a British Colonial Assembly, even a subordinate judge may, I think, without presumption, consider briefly, as I propose to do, the rationale of the common law view, so entertained by one high court, and so repudiated by another. The learned Lord, who pronounced the opinion of the Judicial Committee in *Doyle v. Falconer*, used these words: "If the elaborate judgment which was pronounced in *Kielley v. Carson* has, in terms, left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question." Now, it is because I feel that in reference to the question before us, the same cannot be said of *Kielley v. Carson*, nor, save to a limited extent, of *Doyle v. Falconer*, that I take the liberty of remarking on some of the reasoning which those cases present. While venturing to do this, I confine myself to a consideration of the power under review, as exercised by a Legislative Assembly, in relation to a member of that Assembly, offending, in the face of the Assembly, against the Assembly itself.

The learned Lord who delivered the opinion of the Committee in *Doyle v. Falconer*, while considering what might be urged in favor of the right contended for, said: "On the other hand it may be urged, with at least equal force, that the power in question is of a high and peculiar character, that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it judges of their own cause, and judges from whom there is no appeal; and that, while it may be safe to entrust it to magistrates who would all be personally responsible for any abuse of it to some higher authority, it may be very danger-

"ous in the hands of a body which from its very constitution "is practically irresponsible." While I feel the force of that reasoning as far as it extends, it occurs to me, nevertheless, that something might be said on the other side, which does not appear to have been presented to the minds of their Lordships. The judgment decides broadly that a Colonial Legislative Assembly has not, as such, a power to declare a contempt to have been committed in its presence by one of its own members, and to punish for it. Yet the assumed possible abuse of the power is not very probable, in relation to any Assembly within the Queen's Dominion, upon which competent authority has conferred full legislative powers; and it could only affect a subject's liberty within very narrow limits, and those confined to a body of men who are, in a certain sense, in voluntary association with each other. A Colonial Legislative Assembly is, among other characters that it bears, a society formed under circumstances which involve a presumption that every member of it has, when he entered it consented to have his conduct, in presence of the society, regulated by the majority of those who compose it, and to submit to its sentence, not being contrary to law, nor inconsistent with its rules and usages, if pronounced in respect of his personal demeanor, as a member, in the presence of the Body. In a case of such a sentence I do not perceive a consequence of the anomaly adverted to by their Lordships, viz: that of a power exercised by a judge in his own cause,—not at least to any alarming extent. The censured member has, in that case, in a certain sense, in effect, pronounced sentence on himself. And here I will remark, that, at the time when this plaintiff entered the Assembly as a member of it, which he was when the alleged trespasses were committed, the Assembly had made, and all its members were then subject to, certain standing rules, of which the 13th is in these terms, viz:

"Though freedom of speech and debate be the undoubted privilege of the House, yet whatsoever is spoken in the House is subject to the *censure* of the House."

It would be a great mistake to suppose that the word "*censure*" thus used, is limited in import to the mere *brutum fulmen* of a verbal reprimand, even though pronounced under

the imposing circumstance of its expression *ex cathedra* by the Speaker, with all the accessory dignity that the wig could confer. The primary and true meaning of the word is its undoubted meaning in the context. It imports 'judgment,' as the original Latin word signifies, and as every lexicographer of authority defines it. Shakespeare has used it to express "judicial sentence." The 32nd rule of the House is thus expressed:—"In all cases not herein otherwise provided, the House shall be guided by the rules, usages and forms of the Imperial Parliament." If this plaintiff, when he first took his seat, had, in terms, bound himself to submit to the 13th rule, a consequence would have been, that he was subject to the *judgment*—the *sentence*—of the House, in any matter of his conduct in debate. The first "censure" of the House in the case before us was, as we shall see, *in effect*, that the plaintiff had abused the privilege of freedom in debate, and, *in terms*, that, *he had been guilty of a breach of privilege*. A further protection, to some extent at least, from the abuse supposed by their Lordships is found in the power of a constituency to refuse at the hustings to re-elect a late Representative, soliciting a renewal of the trust, if he shall have abused his privilege as a member of the Assembly, and conspired, as the objection supposes, with others, to oppress a fellow member, and to deprive him of his natural liberty.

In speaking of the safeguards that exist from the possible abuses contemplated I have not mentioned the effects of dissolution or prorogation, because they are obvious. But suppose the abuse to be not merely potential, but actual, it could not, in the nature of things, happen to an extent that would have any considerable weight, when placed against the inconvenience and the evil of denying to a Legislative Assembly in a colony that extent of power over its members which alone my opinion would assign to it. In this aspect of the case I will refer to these words which are found in the judgment of the Supreme Court of the United States in *Anderson v. Dunn*. They seem to me very appropriate to the subject of our inquiry. The learned judge who delivered it, said: "But if there is one maxim which necessarily rides over all others in the practical application of government, it is, that the public

functionaries must be left at liberty to exercise the power which the people have entrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. *Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers."*

I recall to mind that a British statesman, still living, when holding office as Colonial Minister, reminded the Legislature of Nova Scotia that in respect of its present and undeveloped condition, it must be content to have its work by its public men somewhat cheaply and roughly done. That was not flattering, and the Colonist must console himself, if he can, with the thought, that he has since out-grown his then unfledged condition, and may venture out of the nest and try his young pinions in the air.

The population of this Province is now nearly, if not quite, 400,000, and that of the whole Dominion, of which it forms a part, not much less than 4,000,000. The Dominion has its Representative Assembly—its House of Commons. The Province has its Representative Body—its House of Assembly. The same Common Law rule, in reference to the question under consideration which would rule the former Assembly, must equally govern the latter. Neither Assembly is in a material degree distinguishable from the other as regards the human composition of the body, mentally or morally considered. Each is composed of British subjects, proudly conscious that they are such, possessing, relatively to its number, as large an amount of common sense, intellectual capacity, reverence for law and liberty, and knowledge of the broad leading principles of law, as can be predicated of any other Legislative Assembly under the British Crown, the House of Commons of Great Britain alone excepted. I feel that I am not travelling out of the case before me to express this opinion, because in this case is involved the question, "can such a Legislative Assembly as that of the Province of Nova Scotia be safely entrusted with the right to exercise such a power as that, the particular exercise of which has induced the action in the present case?"

The following are substantially the material facts of the case. They are all set out in one of the pleas of justification, and all are proved. The plaintiff, being a member of the House, had charged another member of the House, in its presence and in debate, with having *fulsified a record*. A committee had examined the charge and reported that it was without foundation, and that the member charged was completely exculpated by evidence. The House had adopted the report. The plaintiff had been, by an order of the House made after a resolution had passed to the effect that the plaintiff, in preferring the charge without sufficient evidence and preliminary investigation, *had been guilty of a breach of privilege*, required to apologize at the bar of the House, sitting with open doors, in these terms: "Being convinced that in making the charge I did so without sufficient evidence to authorize me in my place in Parliament to accuse a member of this House of so serious an offence, I do now apologize therefor to this House, and trust to be excused by the House for having preferred such a charge without sufficient and due consideration." The plaintiff had refused to obey that order, of which he admitted in the House that he had been notified; and, being asked by the Speaker if he was prepared to apologize as required, had stated that he did not intend to do so. At the same time the House, in the presence of the plaintiff, had further resolved that he should not take his seat until he complied with that order, and required him forthwith to withdraw from the House until the dictated apology should be made. The Speaker had subsequently inquired of him if he was prepared to withdraw from the House as resolved, and he had declined to withdraw. The House then, in the presence of the plaintiff, passed a resolution excluding the plaintiff from the House, which I shall presently notice in its very terms. The plaintiff was then, in pursuance of that resolution, removed from the House by the officers of the House.

That removal is the trespass complained of. The offence for which the plaintiff was so removed was (*not a past offence, but*) an offence then and there committed. His *delictum* was continuing at the very moment of his removal.

The tenth plea is marked by some inaccuracy in the recitals

of the proved journals of the House. It states, for instance, that the plaintiff was, by resolution, required to apologize to *the Provincial Secretary*, as well as to the House, whereas the journal shows that he was required to apologize to *the House alone*. The pleader also, in setting out the excluding resolution of the House, has stated that thereby the House resolved that the plaintiff, in having taken his seat without apologizing, and having refused to retire in obedience to the order of the House, "*had been guilty of high contempt thereof*," whereas there are no such words as these last in the resolution. The word "contempt" is not mentioned in it. As the language of that resolution is important in my view of this case I shall recite it as it appears on the journal. Its terms are these:—Douglas B. Woodworth, Esquire, member for the County of Kings, having *this day* taken his seat, without having made the apology dictated by this House, in the resolution of the twenty-eighth day of April instant, and *having refused to withdraw from the House, in obedience to the resolution just passed by the House*; *Therefore resolved*, that the said Douglas B. Woodworth be, *forthwith*, removed from this House by the Sergeant-at-Arms, and be excluded therefrom until he shall have signified to His Honor the Speaker that he "is prepared to make the apology required by the House." There are in the plea also some inaccuracies as to the dates of the passing of the resolutions. They were, however, altogether unnoticed at the trial, and they are immaterial, as they could not possibly mislead. There was no demurrer to the tenth plea. The notes of the learned judge show that, at the trial, all the facts which are reported as proved, were brought out in evidence without any objection having been made in respect of the mode in which any matter alleged in the plea by way of justification is set out in the plea, and without any objection of a variance between any of the defensive allegations in it, and evidence proffered by the defendants under them. The tenth plea, in my opinion, contains a complete justification as to the whole proved trespasses. I am of opinion, also, that the evidence fully sustains it.

"The learned Judge, who, in summing up to the jury, instructed them that they were bound to find for the plaintiff,

thus expressed himself, while referring to the apology dictated: "To many persons the exacting of such an apology as a condition of his remaining in the House would be much more of a punishment than a moderate fine or imprisonment, and it is hardly necessary for you to ask yourselves the question urged by the plaintiff's counsel, "whether or not the more high-minded the man was, the more difficult it would be to repeat such an apology." The learned judge added, "I think that the House had no legal right to exact such a condition to the plaintiff's remaining in his seat and discharging his legislative duties." With great deference for the opinion of my learned brother, I am obliged to dissent from this. It appears to me that, regarding the terms of the dictated apology in the light of the proved surrounding and antecedent circumstances, all of which the House, in dealing with a member guilty of a breach of privilege, and formally resolved to be guilty of such, would naturally and properly consider, there was nothing oppressive, vindictive, or unnecessarily humiliating thus required from the plaintiff. I say this, having regard to the charge against another member of the House which he had made—a charge in any view of it, *as made in the House*, uncalled for, and above all, *without any legitimate object whatever that could be promoted in that place*; having regard also to the report adopted and confirmed, to the fact that the plaintiff had spoken, in the House, of the majority as a corrupt and packed majority, of the majority of the Committee as a packed majority, and in words to the effect that *they were owned by the Government*; and had spoken of himself as feeling the insults and tyranny of a packed majority; and having regard also to the fact that he had charged the Speaker with embezzlement of the public moneys, and all this in the presence of the Assembly, and all being connected with the breach of privilege committed. As regards the opinion expressed at the trial by my learned brother, that the exacted apology was illegal, I must make these observations: If it was illegal under the circumstances, then, it must necessarily follow, that the grossest conceivable insult, even to the occupant of the chair, even one involving a charge against him of falsifying a public record, offered on the floor of the House, by a member

of it, would be an offence for which the House could not compel that member to apologize, in terms that would require him to acknowledge, (and this plaintiff was not required to do more,) that in making the charge he had done so without sufficient evidence to authorize him, in his place, to accuse the Speaker of the House of the serious offence he had imputed to him. If the House could not so vindicate itself, it could not, practically, vindicate itself at all; and its condition, in my judgment, would therefore be a condition of abject prostration and utter imbecility. I have put, hypothetically, the case of one member accusing another member, in the face of the House, of a *crime*, a charge of committing which might be the subject of an action for defamation in a court of common law. But, take the case of a mere insult to the Assembly by a member, in its face, which, however derogatory it might be for the Assembly to submit to it for a moment, would not be a matter within the cognizance of an external judicial tribunal, as the subject of an action for slander. Again, let us imagine the degradation of the offended body that would be a necessary consequence, if, referring to the case first put by me, the Speaker were constrained by law, with his arm paralyzed, and with a bitter sense of lost power and dignity, struggling to maintain self respect, to try to conduct the duties of the chair, during what remained of the Session, smarting, the while, under such a charge, with his defiant calumniator staring him in the face with mockery and studied insult, and yet, for vindication of himself and the Assembly obliged to await the opening of the Supreme Court in the then next ensuing term. Surely, if such were the condition of its tenure, the chair of a Colonial Legislative Assembly could not be an object of ambition to any person fit to occupy it. How far soever the maxim *quando lex aliquid, etc.*, so often quoted in such cases as this, may or may not extend to influence a decision, and how limited soever the inherent powers of a Legislative Assembly in a Colony may be, it does appear to me to be a necessary incident to its status, and essential to the performance of its functions, that it may exact from a member an apology for that which the House has resolved to have been a breach of the privileges of the House. If that power exists, the House

alone, in my opinion, is competent to judge of the propriety of the mode and terms of the apology, provided they be not such as involve a violation of any rule or usages of that Assembly, which is not in any way shewn to have marked the conduct of the House in the case before us. It is unnecessary for me to consider the effect of the 32nd rule already mentioned. If, however, the usage and practice of the House of Commons, as to the mode of dealing with a member pronounced to be guilty of a breach of privilege—the prominent feature of this case—be considered, the effect of that rule in its bearing on the case before us will be apparent. That the offence of this plaintiff was in its parliamentary character a breach of privilege cannot be questioned.

The legal mode of dealing with the offending member, if he refuses to apologize, and, after he has been resolved to have been guilty of a breach of privilege, remains to be considered. The verdict in this case must be taken to have proceeded from an opinion expressed by the learned Judge, which in my humble judgment is not warranted by the evidence. It was to the effect that the plaintiff was removed from the House by way of punishment for a then past contempt of the House; and the jury were told that *therefore*, their verdict should be for the plaintiff. Now it appears to me quite clear that the removal was not ordered as a punishment, but as the only possible means at the command of the House of compelling obedience by the plaintiff to an order of the House that required him to do something which it was competent to the House to require him to do. The removal *was not ordered that the plaintiff should expiate any previous offence by punishment*. The House deemed the then presence of the plaintiff in the House, required to apologize for what had been pronounced to be a breach of privilege, and declaring, then and there, his intention not to apologize, to be, in effect, an obstruction to the business of the House. In my opinion, his continued presence therein, under the circumstances, was in its nature, and would have been in its necessary consequences such an obstruction. The business of the House could not have been conducted, with decency, order, and self-respect, if the plaintiff had been allowed to remain in the House. Self-protection, therefore, in

my opinion, called for his removal, *as a necessity*. It must be borne in mind that the plaintiff's refusal to apologize, coupled with his avowed determination to remain in the House—the actual ground of his expulsion—*was a matter that could not have been taken cognizance of by the ordinary legal tribunal of the Province*.

It would be a fallacy to contend that, because this Legislative Assembly resolved that the refusal of the plaintiff to make the apology dictated by the House was “a contempt of the House,” therefore the Assembly then adjudicated plaintiff to be in contempt for a *past* offence; for, in the first place, the contempt referred to in the resolutions of the 30th of April was *a then present contempt*. The plaintiff was removed, not by the resolution just noticed but by a subsequent resolution which does not speak of contempt, for keeping his seat contrary to the order of the House of which he had notice. The very language of the resolution of the 30th of April is “that the refusal to apologize *is* a contempt.” The plaintiff had, in the same hour in which the resolutions were passed, in the hearing of the House, refused to apologize. In the second place, the first resolution of the 30th of April is followed up, then and there, by another resolution which does not profess to punish, but merely requires the plaintiff to *withdraw from the House* until he apologizes. There is no evidence in the case of an adjudication of or for a past contempt, nor does any evidence exist of the House having resolved that the plaintiff had been guilty of a contempt, except that furnished by the resolution noticed, which declared that the plaintiff's refusal to apologize was a contempt. The final resolution of the House, *that* under which the plaintiff was removed, as already noticed, makes no mention of a contempt. That resolution, and the action which the House took upon it, which last is the trespass for which the verdict was given, come clearly within that exercise of power by a Colonial Legislative Assembly which is recognized as legal by the Judicial Committee in *Doyle v. Falconer*—legal because essential.

The right of any Legislative Assembly, having full powers of legislation, to declare by resolution an act or words of a member of it, done or uttered in the House, to be a contempt,

cannot, as I conceive, on any principle be questioned. Whether such an Assembly, not being the House of Commons of Great Britain, has an inherent right in it, to adjudicate such act or words to be a contempt, and by a subsequent resolution or order to punish it judicially as such, is a distinct question which, if it were still an open one, which, of course, it is not, it would be unnecessary for me, as I regard this case, to consider, in order to forming an opinion on it.

But there is an aspect of this case not yet distinctly noticed, in which, having regard to the standing rule of the Assembly No. 13, above recited, it must be further viewed. The Assembly, aware that the charge made by the plaintiff, on the floor of the House, against a member of the House, was preferred *in debate*, while the Speaker was in the chair, regarded the plaintiff's conduct in that respect as *an infringement of the rule*, and entirely within the rule, dealt with it thus: The House, on the 28th of April, after reciting that particular conduct of the plaintiff in debate, the report of the Committee, and its adoption, and reciting that the charge had been preferred without due and proper investigation by the plaintiff, and that it had been accompanied by expressions tending to lead the House to believe that the said charge was founded in fact, and could be sustained, resolved in these terms:—"That this House feel it to be their duty to express the opinion that in *preferring such a charge*, without adequate and sufficient evidence to sustain the same, or the proper and necessary preliminary investigation requisite to the formation of a correct opinion thereon, the said Douglas B. Woodworth *has been guilty of a breach of privilege*, and that he be dealt with according to the rules and practice of Parliament."—See May's Treatise, (7th ed.) page 35. That resolution was the "censure"—the judgment of the Assembly upon the point, whether the plaintiff, in respect of the charge he had made, under the circumstances of making it, had, or had not, (to adopt the very language of the 13th rule), exercised his "undoubted privilege" of "freedom of speech and debate," within the spirit and meaning of the rule, or, on the contrary, had abused the privilege and thereby become obnoxious to "the censure of the House." Sir Thomas May says, (p. 93,) "Interference

with, or reflections upon members have always been resented as indignities to the House itself." If that passage refers, as, no doubt it does, to insults to members proceeding from without, such can be no less offensive if committed within either House of Parliament, and by a member of it against another member. Such would necessarily be an offence against the House. We have already noticed the 32nd rule of the House of Assembly, thus expressed: "In all cases not herein otherwise provided, the House shall be guided by the rules, usage and forms of the Imperial Parliament." Any person reading Sir Thomas May's work will find that the usage of the House of Commons as to requiring apologies from members, is not confined to cases where such requirement is designed to prevent hostile personal encounters; but that they have often been ordered to be made to the House. An offending member is no longer, it is true, required when censured, to kneel at the bar, or to be exposed to public gaze and ridicule, seated on a horse with his head to the tail, and holding on to that appendage. Civilization and education have abolished such primitive barbarities; but this wholesome mode of Parliamentary "censure," refed from the archaic accompaniments, survives, and by virtue of rule 32, as well as of the reason, fitness, and necessity of the thing, is an Imperial Parliamentary usage that is for legitimate practical application by this Colonial Assembly.

All the proceedings of the House in relation to the plaintiff, subsequent to the first "censure," based on it, and culminating in the expulsion of the plaintiff until he should apologize, were, in my opinion, legal, and within the matter of justification substantially set out in the defendant's tenth plea. The case before us appears to me to be within those powers of a Colonial Legislative Assembly which are judicially declared to be constitutional and legal by the Lords of the Council in *Doyle v. Falconer*.

The conclusion arrived at by my mind is, that the rule for a new trial should be made absolute.

NOTE subjoined by Mr. Justice Wilkins in relation to that paragraph in the above opinion which particularly refers to the 10th plea:—

"I find that although all that is stated in that paragraph is entirely warranted by the printed copy of the 10th plea furnished to me at the argument, the original plea on file, to which my attention has been drawn since my opinion has been delivered, does not contain a statement 'that the plaintiff was required to apologize to the Provincial Secretary.' The footnotes as to dates of the passing of the resolutions referred to by me appear also to have been corrected in the plea on file."

MCDONALD, ET. AL., v. MERCHANTS' MARINE INSURANCE COMPANY.

Where Plaintiff's Attorney had taken from the files of the Court a deposition taken *de bene esse* on the part of the Defendant, but the Defendant did not succeed at the trial in proving the illness or absence from the Province of the witness with sufficient clearness to entitle him to have the deposition read, if procured.

Held, that the fact of the deposition having been removed from the files of the Court did not constitute sufficient ground for disturbing a verdict in favor of Plaintiff.

In this cause a rule nisi was granted to set aside a verdict for Plaintiffs upon affidavits setting out surprise, a deposition *de bene esse* taken on the part of Defendants having been removed from the files of the Court, and not being forthcoming on the day of trial.

McDonald, Q. C., in support of rule.—Reads the affidavit of J. N. Ritchie, Q. C., Defendant's Attorney, alleging that a deposition taken *de bene esse* in the cause was taken off the files of the Court before the trial, and setting out a defence upon the merits; also, the affidavit of the Deputy Prothonotary, John McGillivray, alleging the filing and taking off the files of the deposition; also, the affidavit of the Commissioner, Wm. Twining, who took the deposition.

Attorney General contra.—The affidavits read do not disclose all the facts, and disclose a contradiction. According to the Statute of last year, under which the examination was taken, the party taking it has the right to dispose of it. The Defendant is not prejudiced. Reads affidavit of P. H. LeNoir, Esquire, Defendant's Attorney, alleging that the deposition was handed to the Deputy Prothonotary, with instructions to put it among the papers in the cause, but not to file it, alleging that deponent is a Commissioner, and the practice is to hand depositions to parties at whose instance they are taken, that Defendant did not prove the illness or absence from the Province of the witness whose deposition was in question. Also, his own affidavit, corroborating that of Mr. LeNoir, with a copy of Judge's minutes annexed. There is no evidence that Mr. Ritchie put himself in a position to demand the production of the deposition. Cites *1 D. & L. 34*.

McDonald, Q. C., in reply.—The only question here is, whether the Defendant was precluded from giving evidence

A. McDONALD v. H. McDONALD ET AL.

H. McD. went on certain land as far back as 1823. In 1848 he entered into an agreement under seal with A. B. McD., attorney of G. McD., who had the legal title to the land in question, to pay for it.

H. McD. made payments under the agreement, cleared some of the land and built on it. Subsequently in 1853, A. B. McD. took out Letters of Administration of the estate of G. McD., obtained license to sell from the Probate Court in March, 1859, and in May, 1860, sold the land in question under the license to plaintiff, who was aware of defendant's possession and of his having made payments under the agreement and improved the land.

Held, that assuming that defendant could be treated otherwise than as a debtor to the estate for the purchase money, the plaintiff, who had brought ejectment, must show clearly that having been lawfully in possession under an agreement to purchase, he had become a trespasser, by repudiation of the purchase or breach of the agreement on his part and demand of possession, and that in the absence of such evidence the rule to set aside the nonsuit must be discharged.

This was an action of ejectment, tried before Mr. Justice Smith at Antigonish. His Lordship directed the plaintiff to become non-suit, on the ground that no notice to quit or demand of possession had been proved by plaintiff.

Rule *nisi* was granted to set aside the non-suit, and was argued during the July term, 1875.

H. Henry, in support of rule.—Plaintiff relies upon the repudiation by Hugh McDonald, defendant, of the agreement for the purchase by him of the land in question; *Knatchbull v. Graham*, 1 Maddock, 153; *Harvey v. Graham*, 5 A. and E. 61. Here the defendant having refused to complete his contract, plaintiff is not bound to allege or prove a breach, and is entitled to treat the subject matter of the contract as if there had been no contract. There is evidence of the rescinding of the agreement, which should have gone to the jury. The defendants on motion for non-suit, contended that the agreement created a term, which was outstanding at the time of action. The repudiation ended the term, if there was one, and defendant was not entitled to notice.

C. S. Harrington, (with whom was W. A. Johnstone, Q. C.) contra:—The defendant was put into possession under an agreement to purchase. The agreement was made in 1848, and eleven years afterwards, money having been paid under it, this action was brought. It could not be brought unless it was claimed that something was due. Would ejectment lie if defendant failed to pay any of the instalments? We contend

that it would not, that the defendant had an equitable title to the land. Our second point is that the plaintiff bought the land knowing that it was in the adverse possession of the defendant. One of the repudiations was made to the plaintiff before he had purchased the land. See *3 Sugden on Vendors*, 440 ; *Selwyn's N. P. Ev.*, 670. (RITCHIE, E. J. ; the party who sold to plaintiff could have brought ejectment at any time at law ; the title was never out of him ; and he could convey to plaintiff.) Not without notice or demand of possession so long as defendant paid the instalments, and there is no demand here. The evidence of repudiation on which plaintiff relies is that defendant refused to settle for the land ; but the deposition of *Angus B. McDonald* proves that defendant came to him to settle. The first repudiation, if it be such, was before the death of George McDonald, who owned the land,—after that defendant offered to settle ; and it was after George McDonald's death that the second repudiation took place. Cites *Fry on specific performance*. 306. The second repudiation was merely a refusal to settle with an agent on the ground that the principal was dead. It was made to a party who had no interest at the time. *10 A. and E.*, 427.

W. A. Johnstone, Q. C. This being a contract for the sale of land, in writing, can only be repudiated in writing. Cites *Taylor on Evidence* 1045-6-7. We contend that this agreement constitutes a sort of tenancy, entitling the defendant to remain in possession twenty years, and then to get a deed if he had paid the consideration money. The oral repudiation to be effectual, must be accompanied with some overt act ; and no such act is proved here. There must be an entire frustration of the whole contract ; *Addison on Contracts*, 265 ; *4 B. and S.*, 299. Can plaintiff make out that there has been a repudiation without proving that money was due and payment refused ?

Weatherbe.—Cites *Cole on Ejectment*, 288, and 373.

RITCHIE, E. J., now, (Dec. 12th, 1876) delivered the judgment of the Court:—

The plaintiff in this action claims land under a deed from Angus B. McDonald to him, dated 20th May, 1859, sold by

him as Administrator of the estate of George McDonald, under license from the Judge of Probate, to pay debts of the intestate. Hugh McDonald was on the land in question as far back as 1823, and then objected to a survey of it by George McDonald, and since then he and the other defendants, his sons, have been living on it.

In November, 1848, an agreement was entered into between Hugh McDonald and Angus B., as the agent of George McDonald, in the following terms:—

“Hugh McDonald, Big Allan’s son, Cove, doth hereby promise and bind myself and my heirs, &c., to pay to Angus B. McDonald, his heirs, &c., for 200 acres of land at the Big Cove, the consideration money to be paid for the same being eighty pounds currency, payable by instalments, viz.: the sum of £4 cur. per an. for the period of twenty years to be paid to Angus B. McDonald and his heirs, without any detriment whatever, with interest. As witness whereof, I have hereunto fixed my mark and seal this day and year above written.”

This agreement was signed and sealed by Hugh McDonald and Angus B. McDonald, agent for Captain George McDonald, and bore date 29th November, 1848.

The letter of attorney from George to Angus B. McDonald is dated the 28th July, 1823. Letters of Administration on his estate were taken out by Angus B. 31st October, 1853, and License to Sell, 8th March, 1859; Deed from Angus B. to his son, Ansell, 20th May, 1859, and the writ in this suit was issued on the 16th June, 1859.

The plaintiff, according to his own evidence, was aware of the possession of the defendant, Hugh McDonald, anterior to the agreement, and of the terms of the agreement, of his having built on the land and cleared and improved it, and that payments had been made on account of the purchase previous to the sale by his father, at which he became the purchaser, and he well knew that Hugh resisted the right of Angus to dispossess him, and it is very evident that he (Hugh) urgently protested against the sale taking place. The plaintiff therefore acquires the position of a volunteer who buys what he knows to be a disputed title.

Assuming that the Administrator of George McDonald could treat Hugh otherwise than as a debtor of the estate for the balance, if any, due on the agreement, the plaintiff in this action must show that having been lawfully in possession under the agreement, he has ceased to be so, and has become a trespasser by a repudiation of the purchase on his part, or a breach of the agreement, and a demand of the possession; and of this, I think, the evidence should be very clear and satisfactory. That which is relied on as a repudiation is not of that character, and rather amounts to a dispute as to the powers of Angus under his Letter of Attorney and his right to dispossess him; and the evidence of Angus as to the payments made to him under the agreement is most unsatisfactory. He was in a position to have told us what had been paid and was due on it; and once at least after the death of George McDonald, he tells us, Hugh came to his house to have a settlement with him, when Angus told him he could not settle with him, as George was dead. Subsequently, it is true, he said he would keep the land till he was dispossessed by law; but that, addressed to the administrator of the estate of George, who, as such, had no right to dispossess him, could hardly be deemed a repudiation of George's title, and would not justify the plaintiff, as a purchaser under a sale by the administrator, in bringing an ejectment against him without any notice or demand of possession, and he gave or made none, for the conversations testified to by him as having taken place between himself and Hugh can have no bearing on this point, as they occurred before he had made the purchase, or was in any way interested in the land. I think, therefore, that the rule to set aside the nonsuit in this case should be discharged.

PUGH v. PETERS ET AL.

Plaintiff and the two defendants purchased a field, divided the front portion into lots according to a certain plan, laying off two lots as proposed streets, connecting an existing street with the undivided rear portion of the land, and furnishing the only access to that rear portion from any existing street. The defendant, P., purchased the undivided rear portion and two of the front lots, one on each side of one of the proposed streets, the said lots being described in the deed as bounded on the north and south respectively by the street in question.

Held, that the plaintiff was estopped, as a grantor in the deed to defendant, P., from denying that a right-of-way was granted over the land designated in the deed and on the plan under which the sales were made as proposed streets.

Held, also, that although the land designated on the plan as proposed streets was subject to a right-of-way to the rear and to any portion of the adjoining lots, yet that, as the title to it remained in the plaintiff and defendants, it was subject to partition under chapter 102 of the Revised Statutes.

This was a petition for a partition under Ch. 102, R. S., the petitioner claiming a partition of certain lots reserved as streets on a plan of lands owned by him in common with the respondents. The main facts are indicated in the head note, and are set out at greater length in the judgment of the Court below. The cause was tried at Halifax, and a verdict found for defendants. A rule *nisi* was granted by the Judge who tried the cause, to set the verdict aside and grant a new trial, upon the grounds that the verdict was contrary to law and evidence and to the charge of the learned Judge, and inconsistent with the findings of the jury upon the questions submitted to them by the Judge, and for the improper reception of testimony. The cause was argued during the July Term, 1875.

Weatherbe, in support of rule.—There is no evidence of a dedication of the land in question to the public. It was only laid off on the plan as "proposed streets." It could not have been accepted by the city, as the city laws forbid the adoption of streets less than *sixty* feet wide; see ch. 81 of the Provincial Acts of 1864, sec. 262. See *1 Washburne on Real Prop.* 624. There is no question of equity here; the only question is as to the legal title of the parties. If the petitioner has any interest in this property he has the right to have it divided; *1 Washb. R. P.*, 428; *3 Washb. R. P.*, 582; *3 Metcalf*, 544; *5 C. B., N. S.*, 174; *Broom's Leg. Max.*, 480; *9 Gray*, 36. The plan referred to in the deed is part of defendant's

legal title ; the deed says, "plan on file in the Crown Land Office," while there was no plan on file at the date of the deed.

Meagher, contra.—The City Act referred to does not prevent parties from opening lands to the public as streets or ways. The case cited from *3 Metc.* differs from this. A partition of the street would be inconsistent with Peters' use of it as a street. Cites *10 C. B., N. S.*, 400. Pugh having given a deed bounding lots 8 and 10 on the proposed street, cannot come in now and ask for a partition to set off one-third of that street. The land contained in lot 9, the proposed street, belongs to the proprietor of the adjoining lots, who owns to the middle from his lots on each side. In *7 C. B., N. S.*, 372, it was held that the maxim about the freehold to the middle of a road applies equally to a private as to a public road. In *2 Smiths L. C.*, 163 to 167, the whole question is discussed, and it is stated that a vendor bounding land sold on a street in a plan, enters into an implied covenant with the vendee that the street will remain open forever. See also *5 Exch.*, 557 ; *Esply v. Wilkes, L. R.*, 7 *Exch.* If a new trial is granted and a verdict found for plaintiff, how will a partition be enforced ? In the case cited from *3 Metc.* it was laid down that if a partition would prejudice the defendant, the Court would not decree it.

McDonald, Q. C., follows.—The date of the plan filed in the Crown Land Office is immaterial, as all the parties have adopted it under their hands as a copy of the other under which they sold the land. The City Law referring to the width of streets cannot affect the case ; the dedication of a street is a matter of intention merely. *3 Washb. R. P.*, 70 ; *Washb. on Easements*, 180-1. The intention of the parties here cannot be disputed, whether the road they intended was of the legal width or not. Cites *3 Washb. R. P.*, 412 ; *7 Gray*, 21 ; *Freeman on Partition*, sec. 502, p. 612.

Weatherbe, in reply.—When the width of a lot is given in the deed, and that width goes to the side of the street, the freehold in the street is excluded ; the width is given here in the deeds and on the plan ; *12 Gray*, 410. This law contended

for as to streets applies to streets dedicated, if accepted or in use ; 3 *Washb. on Easements*, 363. Here we have nothing more than the words, "proposed street." The question, why should the Court divide this land, is not material ; 3 *Metc.* 546.

RITCHIE, E. J., now, (Dec. 12th, 1876,) delivered the judgment of the Court :

The property known as the Bremner field, in the city of Halifax, was owned by the plaintiff, John Pugh, and the defendants, Henry Peters and Thomas Lahey, who laid off a tier of lots on Pleasant Street, comprising the whole front of the field. The remainder of the field was situate in the rear, between these lots and the harbor.

All the lots so laid off were sold agreeably to a plan, on which were laid out two proposed streets, one extending from Pleasant Street to the undivided part of the field in the rear, between lots numbered eight and ten, and the other on the extreme south of the field, adjoining lot numbered seventeen which was purchased by Mr. Frecker. Except through these proposed streets there was no access from any public street to the rear and unsold part of the field ; subsequently the plaintiff, Pugh, and the defendant, Lahey, sold and conveyed to the defendant, Peters, the whole of this rear portion of the field.

At the sale of the lots on Pleasant Street, Peters purchased lots 8 and 10, and in the deeds which he received number 8 is described as bounded on the south by a street and extending thereon 120 feet, *i.e.*, to the rear of the lot, and number 9 as bounded on the north by a street aforesaid, and extending thereon 120 feet. The deed to Frecker of lot No. 17 described as his lot, is bounded on the south by the reserve of a street. These numbers are referred to in the deeds as appearing on a plan of division of the Bremner property, so called, filed in the office of the Commissioner of Crown Lands in Halifax.

The proceedings in this case have been taken by Pugh, as plaintiff, against Peters and Lahey, as defendants, to compel a division of the portions of the field laid out on the plan under which the lots were sold as *proposed streets*. On the plan they are both so designated, and the plaintiff's contention

is that he never conveyed his interest in those two pieces of land, and had never dedicated them to the public as streets, nor created a right of way over them for the benefit of the defendant, Peters, but had a right to one-third thereof, and to have it set off to him as his exclusive property in severalty. Though Lahey has been made defendant, he is acting in unison with Pugh, who claims to have a lien on his share under a judgment which he has against him.

It is quite clear, I think, that the plaintiff, Pugh, is estopped from denying that a right of way was granted over the portions of the land now in question, and cannot take possession of it, or use it in any way which will interfere with the enjoyment of that right. These streets were obviously laid out to render the lots more valuable, so as to command a higher price at the sale, as well as to afford access to the portion of the rear, which would be inaccessible without them, and to Peters and Frecker, whose lots are bounded by them in their respective deeds, there is an implied covenant from the grantors that they should forever have a right of way over them. *Roberts v. Karr*, 1 Taunt, 495, and *Harding v. Wilson*, 2 B. & C., 96, are authorities for this. In the former Lord MANSFIELD said: "If you have told one in your lease, this piece of land abuts on a road, you cannot be allowed to say that the land on which it abuts is not a road;" and LAURENCE, J.: "If a man buys a piece of ground described as abutting on a road, does he not contemplate the right of running out into the road through any part of the premises?" There no actual road existed; the land was merely described as abutting east on a new road. In the latter case a piece of land was granted, abutting upon an intended way, which was held to give a right of way.

These cases are cited and recognized as law in *Esply v. Wilkes*, L. R., 7 Ex. 298. In the United States the cases in support of this doctrine are numerous, and are referred to in *Washburn on Easements*, 240 to 245, and 181-2.

In these cases it is broadly laid down that where a grantor conveys land bounded on a street or way, he is estopped to deny the existence of such street or way, and the grantee acquires by the conveyance a perpetual easement or right of

age upon and over it, from the full enjoyment of which an never afterwards be excluded.

t the argument it was contended on the part of the defendant, Peters, that the title to the land passed to the purchasers of the adjoining lots by their deeds, on the principle the lots extended to the centre of the streets. If the had been simply bounded by the streets, that might have been the case; but they were sold as specific lots by number on the plan, with the dimensions specified in the deed, the usage of which appears to me to exclude the streets or sidewalks, and to prevent them from setting up a claim to the land itself, while it conferred on them the right to use it as a street way.

Assuming that the title to the land did not pass to the purchasers, but that they acquired a right of way over it, a question arises whether the Plaintiff is entitled, under the provisions of Cap. 102 of the Revised Statutes to compel a division of the land, and to have a third of it set off to him in severalty. This chapter provides that a petition for partition may be maintained by any person who has an estate in possession, the court shall cause partition to be made, and the share of the petitioner set off and assigned to him. The object of this legislation doubtless was to provide for the partition of lands held and occupied in common, so that each might be put in possession of and enjoy his share in severalty; and it could not have been the intention that where the title to land, without any beneficial interest in it, was held by two or more persons in common one of them should be enabled to compel the others at their joint expense to make a useless division, it is not probable that the Plaintiff would have instituted these proceedings if he had not entertained the belief that he was entitled to the full enjoyment of one-third of the land and that it was to be divided, as was contended for by his counsel on his behalf; otherwise he would only have incurred expense to himself, and occasioned it to others, without the hope of any beneficial results.

But though the Legislature may never have contemplated that the provisions of the act should be called into operation

in a case like this, the question remains whether under its terms the plaintiff cannot insist upon a partition.

Where the soil and freehold over which there is a right of way, is vested in *individuals*, though they cannot interfere with the use of the road or way as such, they are entitled to exercise certain acts of ownership over it, and it would seem from the case of *Baring v. Nash*, 1 V. & B., 554, that minuteness of interest is no objection to a claim for partition. *St. Mary's, Newington v. Jacobs*, L. R., 7 Q. B., 47, shews that an owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public, and may exercise all other Acts of ownership not inconsistent with such dedication ; and in *Goodson v. Richardson*, L. R. 9, Ch. App., 221, where water pipes had been laid in the soil of a highway without the consent of the owner of it, an injunction was granted, and the fact that the soil under the highway was of no value to the owner, and that his motion for applying to the Court was not connected with the enjoyment of the land, were held to be no reasons against granting it. That actions at law may be maintained against parties trespassing on the rights of the owners of the soil, see *Lade v. Shepherd*, 2 Str. 1004; *Stevens v. Whisten*, 11 East, 51, and *Reg. v. Pratt*, 4 E. and B. 860, the latter a very striking case on the subject.

Inasmuch as the plaintiff has an estate in the soil of the street in possession, subject only to an easement, he comes within the terms of the act, and, though a partition in this case would seem useless and be attended with no practical benefit to either party, I am forced to the conclusion that under the terms of the act he is entitled to it. I am of opinion, therefore, that the rule *nisi* for a new trial should be made absolute.

But as the petitioner (plaintiff) both on the trial and at the argument, claimed the land absolutely, and sought for partition to put him in possession of his portion, free from any easement of a street or way, and the petition was in the first instance presented with this view, and, as he has failed in this, we think he should not have the costs of the argument.

DESBARRES v. LANDRY.

Where one of two Arbitrators who had made a certain award, subsequently made an affidavit setting out that he intended to decide the case according to law, but on reconsideration of the matter, and on reperusal of the minutes of evidence, he felt persuaded that in making the award he misunderstood the evidence given in the matter, inasmuch as he took for granted that no evidence was given of a certain fact, which upon the minutes of the evidence being read before the Court, by consent, appeared to be material and to be in proof.

Held, that the award must be set aside.

This was an action of ejectment. When the cause was called for trial before Mr. Justice McDONALD, on the recommendation of the Judge, it was referred to arbitration. The arbitrators found in favor of defendant, and a rule *nisi* to set the award aside, was granted by his Lordship, the Chief Justice, on several grounds, the ground relied on being that one of the arbitrators in making up his award had misapprehended a material portion of the evidence, as shown by his affidavit.

DesBarres, in support of rule.—The arbitrator here has misapprehended the facts and the law, according to his own admission in his affidavit, and in such case the award must be set aside. *Deliver v. Barnes*, 1 Taunton, 48; *Hutchinson v. Shepparton*, 13 Q. B., 958; *Flynn v. Robertson*, L. R., 4 C. P., 44; *in re Hall v. Hines*, 2 M. and Gr. 847; *Dunn v. Blake*, L. R., 10 C. P., 388; *Lockwood v. Smith*, 10 W. R.; *Gore v. Baker*, 4 El. and Bl., 470; *Russell on Arbitration*, 653.

(THE COURT—In these cases the awards were referred back to the arbitrator; your rule is to set the award aside.)

Henry, contra.—Cites *in re Wright and Cromford Canal*, 1 Q. B., 97. In that case the arbitrators stated doubts upon a point of law, and yet the award was not disturbed. The cases cited on the other side are cases of one arbitrator. Where a sole arbitrator says he has not given attention to a particular point submitted, the award may be set aside, but here there were two arbitrators.

It must be shewn before the award will be sent back that it is wrong, which is not shewn in this case. The affidavit of the arbitrator states that he took for granted that there was no evidence of Donald Grant's being in possession, but he does not allege now that there was such evidence. He swears

to his opinion that the case turned upon that point, but there is nothing to shew that the possession was such as to affect the title. The Court will not set aside an award unless it is clear that it is bad. *Cook v. Gent*, 14 M. & W. 680. (Mr. Henry was here allowed to read the evidence in the case by consent, subject to all the objections previously taken, and argued as to merits from the evidence.) The affidavit of the other arbitrator states that the award was the only just one that could be made. *Russell on Arbitration*, 294.

DesBarres, in reply. It is clear from the evidence that Grant and Dorion were endeavoring to defraud plaintiff. It is not necessary to shew that the award is bad, but merely that the arbitrator misapprehended the facts, and that misapprehension affected the award.

SMITH, J., now, (December 12th, 1876,) delivered the judgment of the Court.

This was an action of ejectment brought to recover the possession of certain lands described in the plaintiff's writ issued on the 12th May, 1875. The statutable plea that the plaintiff was not entitled to the possession of the said lands was pleaded. The said cause, and all matters in difference therein, were submitted by the consent of the parties under a rule of Court to the award and arbitrament of Alexander McGillvray, of Guysborough, Barrister, and Archibald McGillvray, of Antigonish. The matter was heard and evidence taken before them, and they made and published their award on the 15th day of October, 1875, in favor of the defendant. A rule *nisi* was granted by YOUNG, C. J., to set aside said award, which was argued before the Court *in banc* at Halifax, at the last December term. There were several grounds taken in the rule, but the important one, requiring, as I apprehend, the consideration of the Court, is that in which a mistake is alleged to have been made by one of the arbitrators, as to the proof given of a material fact, which mistake is stated in an affidavit of said arbitrator. It is true as a general principle that an award is final, and, assuming that it is good upon its face, there can be no appeal from it; the only exceptions to this rule, as recognized by DENMAN and ARCHIBALD, J J. in

Dunn v. Blake, 10 L. R., C. P., 388, are "where there is corruption on the part of the arbitrator or excess of jurisdiction, or where the arbitrator admits that there is a mistake, and as it were, craves the assistance of the Court in setting it right." In *Deliver v. Barnes*, 1 Taunt., 48, MANSFIELD, C. J., says, "I admit that if an arbitrator says, I want to make my award according to law, and have misconceived the law, or I have mistaken the fact, the award shall be set aside, for in either case it is not his award, that is, it is not his true judgment; and in *Hutchinson v. Shepperton et al*, 13 Q. B., 955, it was decided, "that it is not an invariable rule that the Courts will not set aside an award on the ground that the arbitrator has by mistake adjudicated wrongly." In *Hall v. Hines*, 2 M. & G., 847, the award was set aside on the ground of gross mistake amounting to legal misconduct of arbitrators. In *Anderson v. Davey*, 18 Ves. Junr., 447, Lord ELDON remarked: "The rule as to mistake is that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators,—on which Lord THURLOW, in *Knox v. Symmonds*, insisted upon having their affidavits,—Courts of Law and Equity will interfere." In the case of *Philips v. Evans*, 12 M. & W., 309 ALDERSON, B., said: "If this case were precisely like the case in the Common Pleas," (meaning *Hall v. Hines*. just referred to,) I do not say I should arrive at the same conclusion; but it is very different, for here is only the affidavit of "one of the parties that the arbitrator made a mistake." If an affidavit of the arbitrator had been furnished, as in this case, it is reasonable to conclude the decision of the Court would have been similar to that in *Hall v. Hines*. The affidavit of A. H. McGillvray, one of the arbitrators in the case before us, sets out: "That I intended to decide the case according to law, but on reconsideration of the matter, and on reperusal of the minutes of evidence, I feel persuaded that in making the award I misunderstood the evidence given in the matter, inasmuch as I took for granted that no evidence was given of the said Donald Grant's possession of the land in question at the time the defendant received the deed from

"Josephat Dorion and Catherine Grant, and also that the defendant failing in proving possession was bound to shew a documentary title." "I say that in consequence of my having made said award under a misapprehension, I believe that an injustice has been done the said plaintiff." I cannot help thinking that, regarding the nature of the action and the character of the evidence taken before the arbitrators, the minutes of which were read at the argument by consent, the fact of Donald Grant's possession of the land was a most important fact, by which the determination of the arbitrators must, and should have been largely influenced, and in the light of the authorities I have consulted, some of which I have referred to, it can scarcely be contended that the award is the joint award of the McGillvrays, for, as Lord MANSFIELD says, *it is not the true judgment of one at least. I think the award must be set aside, but without costs.*

MORRISON v. KANDICK.

Plaintiff set out in his writ that he had recovered judgment against defendant as administrator and that, to the execution thereon, the Sheriff had returned that defendant had no goods or chattels which were, &c., but had paid the costs of the suit, (the return being set out verbatim,) and the declaration proceeded, "*whereby it appears that the defendant hath eloiigned, wasted and converted to his own use the goods,*" &c. Defendant demurred on the grounds, that no *devastavit* was alleged or suggested; that while it was alleged to appear by the return that defendant had eloiigned and wasted the goods of the intestate, the return, which was set out *verbatim*, did not allege or suggest a *devastavit*; that it did not follow as a legal inference from the return that defendant had been guilty of a *devastavit*, and further that the *devastavit* should be alleged as a fact and not stated as an inference.

Held, that the rule nisi to set aside the demurrer as irregular, must be made absolute, and that defendant, if embarrassed by the declaration, should have applied under R. S., cap. 94, sec. 124, to have it amended, and was precluded by the statute from demurring except after non-compliance by plaintiff with a judge's order to amend.

RITCHIE, E. J., dissenting. !

This cause came before the Court on a rule, remitted to the Court by a judge at Chambers, to set aside as irregular, a demurrer to plaintiff's declaration. The pleadings are summar-

ized in the head-note, and are set out at length in the judgment of the Court.

DesBarres for rule:—The action is brought in the correct form. The fact of obtaining a judgment, as here, is conclusive evidence that he had assets otherwise he should not have allowed judgment to go. See Practice Act, sec. 131. *1 Wm's Saunders*, 331. *Williams on Executors*, 1801. Strike out "whereby it appears," from the declaration, and the demurrer is all gone. Those words can be treated as useless. *Utile per inutile non vitiatur*, *11 East* 65. Sections 124 and 125 of the Practice Act provide for this case if the defendant is embarrassed by the declaration. If the declaration is argumentative, as contended by the demurrer, the defendant should have proceeded under these sections to get it amended. The demurrer states that the pleading is "bad in law"; it should state, according to the statute, that it is "bad in substance." The demurrer is for delay. No plea has been pleaded, although the defendant got an order to plead and demur. *2 Chitty on Pleading*, 484; *Williams on Executors*, 1798; *2 Bing, N. C.*, 176. All that was necessary for us to do was to suggest a *devastavit*. The action would lie without issuing an execution. The Sheriff's return relieves us of the necessity of setting out the allegations the want of which the demurrer complains of. This demurrer is manifestly a special demurrer. It states that we should have set out the pleadings. That would have been utterly useless.

W. A. Johnston, Q. C., contra.—The demurrer is not frivolous unless so palpably. *2 Chitty's Arch.*, 926; *Dalton v. McIntyre*, 1 Dowl., N. S., 77; *Fisher*, 6596; and unless the demurrer appears on face as frivolous and admits of no argument, it will not be set aside. No form of declaration like this can be found. There is nothing to shew what was the nature of the judgment. Cites *1 Saund.*, 216; *2 Chitty on Pleading*, 340.

DesBarres, in reply.—Cites *Chitty's Arch.*, 1230-34; *1 Saund.*, 219; *Ward v. Thomas*, 2 Dowl., 87.

MCDONALD, J., now, (Dec. 12th, 1876,) delivered the judgment of the Court:—

In this cause the declaration sets forth that the plaintiff recovered judgment in the Supreme Court against the defendant, administrator of the personal estate, &c., of William Morrison, which judgment is still unsatisfied and in force,—that a writ of execution was issued and placed in the sheriff's hands, with instructions to levy, and that the sheriff made a return in these words: "the within-named William Kandick has no goods or chattels which were of the within-named William Morrison, at the time of his death to be administered, in my bailiwick, whereof I can cause to be made the sum of \$164.28, or interest, or any part thereof, but hath paid and satisfied the residue of this execution, being the costs within mentioned." The declaration then proceeds thus: "whereby it appears that the defendant hath elained, wasted and converted to his own use the goods and chattels of the said William Morrison."

To this the following demurrer was filed:—

"The said William Kandick, administrator as aforesaid, the said defendant, by W. A. Johnston, his attorney, demurs to the first count of the plaintiff's writ or declaration, and saith that the same is bad in law for the following reasons:—

"1. Because, whilst the action and count are based on a supposed *devastavit* by the defendant, no *devastavit* is alleged or suggested in said count.

"2. Because it is in said count alleged that it appears by the sheriff's return to an execution alleged to have been on an alleged judgment obtained by the plaintiff against the defendant as above, that the defendant hath elained, wasted and converted to his own use the goods and chattels of the said William Morrison, which came to his hands to be administered after the death of the said William Morrison; whereas it doth not appear by the said sheriff's return, which in the said count is alleged to be set out *verbatim* and *seriatim* that the defendant hath wasted, elained, or converted to his own use the said goods, nor doth the said sheriff in and by his return suggest that the defendant hath been guilty of a *devastavit*, and the said count doth not set out or allege the pleadings on which the said judgment was based, so that the Court might be

informed as to the pleas pleaded by the defendant, or whether the judgment was obtained on a *nil dicit*, or confession, or how otherwise.

"3. Because in and by the said count the nature of the said judgment doth not appear, nor is it alleged, whether it was a judgment *de bonis propriis* or a judgment of the goods and chattels which were of the said Wm. Morrison, in the hands of the defendant to be administered, or of assets *quando acciderint*, and the pleadings on which the said judgment is founded not being set out, and the sheriff not having returned a *devastavit* but simply *nulla bona*. it does not follow as a legal inference or presumption from said return, that defendant had been or was guilty of a *devastavit*, and the same is nowhere in said count suggested or averred, but is simply stated as an inference, and because it is bad in law to plead as a matter of inference what should be alleged as a matter of fact."

The plaintiff obtained a rule *nisi* to set the demurrer aside as *irregular*, and the case was argued at the last term, Section 124 of our Practice Act provides that duplicity, argumentativeness, and uncertainty shall be no longer grounds of objection to a pleading, unless such pleading be so framed as to embarrass the opposite party, in which case application may be made to a judge to compel an amendment; and Section 123 provides that, except as therein provided, no pleading shall be deemed insufficient for any defect at the time of passing thereof objectionable on special demurrer only.

In this case all the grounds of demurrer stated and all the arguments used in support of them, are based upon the assumed uncertainty or argumentativeness of the declaration, and I am clearly of opinion that the directions of the statute should have been followed by the defendant to compel an amendment before resorting to his demurrer, if he felt at all embarrassed by the pleadings. Several cases were cited, the strongest of which was *White and others v. Woodworth*, 4 C. B., 752, to show that if the subject matter in question fairly admits of an argument, a demurrer will not be set aside as frivolous. That case was decided in 1847, five years before the passing of the English Common Law Procedure Act which

in England changed the law so far that the Courts held in practice what our Legislature subsequently reduced to the statute of this Province just referred to. Without that statute there might be a question as to whether the demurrer could be set aside in this way. With it, I think the case does not fairly admit of an argument, and that if we held otherwise we would be defeating the clear intention of the act. This, I think, would be the correct view of the case even assuming that the declaration is argumentative and uncertain, which is not at all admitted. The case of *Leonard v. Simpson, Exr. of Simpson*, 2 Bing. N. C., 176, is very strong to sustain the view that the declaration is quite sufficient, even if the statute had not been passed, but it is not necessary here to decide that question. The ground is taken that the cause of action is not so defectively stated in the declaration as to justify the defendant, in the face of the statute, in demurring without first applying to a judge to compel an amendment, and I think it is well taken.

It is not simply that the demurrer is frivolous, but that it is irregular, as the defendant was precluded from demurring to this declaration, except under Sec. 125 of the practice act after noncompliance on the part of the plaintiff with a judge's order to amend. I think that the rule must be made absolute

RITCHIE, E. J., read the following dissentient opinion :—

The plaintiff sets out in his writ that he recovered judgment against the defendant as Administrator for \$164.28 with \$60.90 his costs of suit, and the plaintiff suggested and gave the Court to be informed that he caused an execution to be issued and directed to the Sheriff of Halifax, commanding him that of the goods and chattels within his precinct which were of William Morrison, deceased, at the time of his death in the hands of defendant to be administered, he should cause to be paid the said sums, if the defendant had so much in his hands to be administered, and if he had not so much thereof, then \$60.90, being for the costs aforesaid, to be levied of the proper goods of the defendant; and the Sheriff has returned the execution in these words,—“the within-named Wm. Kandick has no goods or chattels which were of th

within-named Wm. Morrison, at the time of his death in his hands to be administered in my bailiwick, whereof I can cause to be made the sum of \$164.28 and interest or any part thereof, but hath paid and satisfied the residue of this execution being the costs within-mentioned." The writ then goes on to state as follows:—"whereby it appears that the defendant has eloiigned, wasted, and converted to his own use, the goods and chattels of the said Wm. Morrison, which came to his hands to be administered after the death of the said Wm. Morrison."

To this count the defendant demurred as bad in law, and assigned several grounds of demurrer, all of which, however, seem to me to be embraced in this, that no *devastavit* is alleged or suggested in it. The plaintiff obtained a rule *nisi* to set aside this demurrer, which he now seeks to have made absolute.

On the return *nulla bona* alone the plaintiff may obtain execution *de bonis propriis*, by proceeding by *scire facias*, or he may proceed, as has been done in this case, by action on the judgment, but then he must suggest a *devastavit*. The defendant contends that there being no suggestion to that effect there is nothing for him to plead to, as he is willing to admit all the facts stated but is not prepared to admit the legal inference which the plaintiff has drawn from them, that, because *nulla bona* has been returned, *therefore* the defendant has wasted and converted to his own use the goods of the intestate. If the defendant is right in this contention his proper course was to demur, and as the writ would in that case show no ground of action to entitle the plaintiff to have execution of the proper goods of defendant, the demurrer would be *general* not *special*; but whether the demurrer can or cannot be sustained is not now before the Court, and I am not prepared to say that it is frivolous, and should be set aside as such, especially as I find that the form of the plaintiff's writ differs from that given in *Chitty*, where the suggestion said to be wanting is given. See 2 *Chitty's Pl.* 340, (Lib. Ed.) See also *Williams'* note to 1 *Saunders' R.*, 219, where the practice in cases like the present is discussed at length. I cannot consider the objection one of *argumentativeness* or *uncertainty*.

which under the old practice would be merely a special demurrer, which indeed was not urged at the argument. The only grounds then taken in addition to the demurrers being frivolous were that there were no statements on the margin or elsewhere of the matters of law to be argued other than the statement of the grounds of demurrer, and that instead of using the words, "bad in substance," the defendant in his demurrer had used the words, "bad in law." In regard to the former I need only say that by our Practice Act it is not required that there should be any entry on the margin of a demurrer of the matter of law intended to be argued, and the Court has never required any other statement than the statement of the grounds of demurrer; and to the latter, that the defendant has substantially complied with the Act, for though specific forms are given by the Act, the 12th Section of Chapter 1 of the Revised Statutes, "Of the Construction of Statutes," enacts that where forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them.

MURRAY ET AL. v. ROSS.

Fieri, That defendant, after the cause of action accrued, being a trader, became insolvent within the meaning of the Insolvent Act of 1869, and made an assignment under the Act,

Held, Bad on demurrer. McCULLY, J., dissenting.

This was an action to recover the price of goods, the declaration setting out the common counts. Pleas, 1st, never indebted; 2nd, that defendant, after the cause of action accrued, became insolvent within the meaning of the Insolvent Act of 1869. Plaintiff demurred to the second plea, and the demurrer was argued during the December Term of 1875-6.

Sedgwick, in support of demurrer.—There is nothing in the Dominion Insolvent Act of 1869 to deprive the Court of Common Law of its jurisdiction, while the English Bankruptcy Act of 1869, Sec. 54, does contain such provision. The American Bankruptcy Law contains a similar provision. Our contention is that we can prove our claim and take our dividends, and at the same time prosecute our action at Common Law until the Insolvent gets his discharge. Cites *Doria on Bankruptcy*, 745. Even under 49 Geo. 3, Cap. 121, Sec. 14, providing that proving a claim is a sufficient election, the cases decided prove that a plaintiff may go on and prosecute his action at Common Law. Cites *Baldwin v. Peterman*, 16 U. C. C. P., 610; *Hegan et al v. Jones*, 2 Sup. Court Reports, 190; *Edgar's Insolvent Act of 1875*, p. 107; *Harley v. Greenwood*, 5 Barn. and Ald., 95; *Insolvent Act of 1869*, secs. 56 and 145.

Graham, contra.—If plaintiff gets judgment in this case and arrests the defendant under execution, the Insolvent Act contains no provision for his release. Cites *Popham's Insolvency*, 28 n.; and the case there cited. The demurrer admits the allegation of the plea that plaintiffs were creditors of defendant, an insolvent. The word "creditor" is defined in sec. 143 of the Insolvent Act of 1869, as one who has proved a claim under the Act, and who has therefore made his election to take his remedy out of the estate of the insolvent. If a discharge is obtained under the Act, it will not discharge a judgment, if obtained in this case, as the judgment changes the nature of the debt.

RITCHIE, E. J., now, (December 12th, 1876,) delivered the judgment of the Court:—

The plea demurred to in this case is in one respect certainly bad, as, in addition to the defence that the defendant, being a trader, had made an assignment under the Insolvent Act of 1869, there is added that he was not indebted as alleged. If the plea in this respect had only been liable to the objection of duplicity, the proper course would have been not to demur, but to apply to a Judge to have it rectified; but by our Practice Act, 139th section, *nil debet* is not allowed to be pleaded,

and by the 152nd section the general issue and all general pleas are abolished and every pleading is required to specify particularly the facts intended to be denied,—so that the latter part of the plea, as a distinct defence, is bad on that account.

If the plea of the insolvency of the defendant had gone on to state that he had obtained his discharge, I should have esteemed it a good defence to the action, unless it had appeared by the writ that the debt sued for was one of those to which, by the Act, the discharge would not apply, and, if it did not, the plaintiff might reply it, or that the discharge had been obtained by fraud. Though nothing is said in relation to suits commenced against an insolvent after his assignment, suits pending at that time against him are not suspended by the Act, for by the 42nd section the assignee is authorized to intervene and defend, and as there is nothing in its terms which prohibits a creditor from commencing an action against a party after he has made an assignment, pending the proceedings in the Insolvent Court, which may or may not result in his obtaining a discharge, I do not think we can hold that he is to be deprived of his Common Law remedy against his debtor; though, if he should succeed in his action, the judgment would be wholly inoperative if his debtor should have succeeded in obtaining his discharge, while, if his discharge should be refused him, he might be enabled to enforce it, as he would if the debt was of the class against which a discharge would not operate.

I have not arrived at this conclusion without much doubt, for it seems unreasonable, as regards his debts in general, that after a debtor has given up all his property for the benefit of his creditors, one or more of them should retain the right of proceeding against him in any other than the Insolvent Court, where provision is made for ascertaining the validity and adjusting the amounts due to the creditors of the insolvent; and it is somewhat incongruous that there should be two tribunals, and both called into operation, whereby the validity and amount due are to be ascertained, and at each of them it is quite possible a different result might be reached. But notwithstanding this, where a creditor has a right of action in this Court to recover his debt, which right is not necessarily

defeated by proceedings being instituted against him in the Insolvent Court, until he has succeeded in obtaining a discharge, he cannot be deprived of it, pending those proceedings, unless by express enactment to that effect, or by necessary implication, neither of which, it appears to me, exists in this case.

The following dissentient opinion, prepared by McCULLY, J., was read by SMITH, J.

This was an argument of a demurrer. Plaintiff had declared in *indebitatus assumpsit* with the common counts, and the writ was dated the 24th day of March, 1874. The case was heard in the western court room, before the Judge in Equity, and McCULLY and McDONALD, J. J. The defendant pleaded two pleas;—first, never indebted; second, that after the accruing of the alleged claim he was a *trader* and became insolvent within the meaning of the insolvent Act of 1869, and “made an assignment under said Act,” and the plaintiffs were at the time of said assignment, creditors of said defendant in respect to the claim herein pleaded to, and he is not indebted to them as alleged in said action.

To this plea plaintiff demurred and assigned several grounds;—first, that the plea is “duplicate and uncertain, in that it purports to set up two matters of defence, viz., the assignment and never indebted,” but as the age of special demurrers has passed away, there is nothing in this objection; secondly, “that the making an assignment does not alone release or discharge a debtor from his liabilities.” That is not defendant’s plea. His plea is that plaintiff was his creditor, that he was a trader, became insolvent and assigned. The plaintiff’s third ground is that it is not alleged that the assignment was made before action. That is so. But if the plea is one in bar as pleaded to an action, in case the assignment was made before action, is it not a plea equally to the action until it is disposed of? A plea *puis darrein* &c., might possibly be the proper way to get such a defence on the record; but when that objection is not urged, but plaintiff demurs, as here, I much question if it be a ground of general demurrer. If that were an answer in law, plaintiff should have replied

the fact, and not have demurred. Plaintiff's fourth ground is that the plea does not allege that plaintiff's claim against defendant's estate was proven under the Act of 1869. If this be necessary, then, indeed, the plea is defective and bad. But on this hereafter. His fifth objection is that the plea does not allege that defendant obtained a discharge under said Act and sixthly, that the plea should have shewn defendant discharged from his liability by order of the Court, or that the creditor proceeding at common law has proved against the insolvent's estate, and so made his election to proceed against the insolvent's estate and not against himself. It is with such a state of facts before them that the Court is called to decide.

The proceedings in this case, it will be understood, were commenced before the Insolvent Act of 1875 had passed, and the Act known as the Insolvent Act of 1869 controls the case. Although it be designated an "Insolvent Act," still its preamble evidently contemplates possible cases of Bankruptcy as affected by it and provided for. The language is, "whereas" "it is expedient that the Acts respecting *Bankruptcy* and "*Insolvency* in the several Provinces, &c., &c., be amended "and consolidated, &c., &c."

This demurrer is founded, it seems to me, on the assumption that the Act was passed solely for the benefit of *creditors*, without any regard to the rights or conditions of *debtors*. If any single creditor, or any given number of them, can force their debtor into insolvency, and the others stand by, and, notwithstanding that all the estate and means of the insolvent, by operation of law, have been transferred to an assignee, still refuse or decline to prove or make claim, as the Act provides, and by that means can continue their right to proceed at common law by entering a judgment, and this Act is not a bar when well pleaded to such a proceeding, then, indeed, the debtor or insolvent is in a sad condition. I do not think that such was the intention of the Legislature, nor will the Act, in my view, warrant such a construction.

By Section 3 the Interim Assignee shall call a meeting of the creditors by advertisement or by summons to such meet-

, shall prepare and exhibit statements of the Insolvent's affairs, and particularly a schedule, (form B,) containing the names and residences of *all his creditors*, and the amount due to each, &c., &c., and a statement shewing the amount and value of the assets, &c., &c., and the Insolvent is required to attend at such meetings, produce his books, accounts, vouchers, &c., and *submit to examination under oath*.

This is the foundation of the entire proceedings. It contemplates the co-operation of all the creditors, and the production of all claims. The 4th section makes it imperative on the assignee to mail to *each of the creditors*, so far as then covered, a notice of the meeting with a *list of creditors*,

Thus far the proceedings move from the assignee and insolvent; and then preparatory to the choice of an assignee, all previous to this is the act of the Official Assignee), the creditors are required to *prove* their claims, or they cannot sue. When the Statute refers to any act of the creditors as controlled by its operations, I find no qualified expressions, but as, "the creditors *who shall have proven*," or, "whose claims are proven," shall do so and so. See section 39, for instance, where the assignee is to give a bond as security: "It shall be taken in favor of the creditors."

Section 56 gives the creditors the right of ranking, and the clerk, and no reservation is to be found, so far as my researches extend, to warrant the assumption that creditors who do not—will not—prove, for all are supposed to have notice, may in future time be permitted to harrass an unfortunate debtor, deprived of all means of discharging debts contracted before his assignment.

But section 69, it seems to me, largely tends to remove all doubts, where it provides that, "if it appears to the assignee, on his examination of the books of the insolvent or otherwise, that the insolvent has creditors who have not taken the proceedings requisite to entitle them to be collocated, it shall be his duty to *reserve dividends* for such, &c., &c., and notify them, &c., &c." See the entire clause. And the last paragraph orders that if such creditors do not file their claims, and apply for dividends, previous to the last dividend of the

estate, the dividends *reserved for them* shall form part of such last dividend. Then see section 75, providing for unclaimed dividends, ordering their payment after three years, &c., and section 76, giving any balance to the debtor after certain proceedings.

I am assuming here what appears on the record, nothing more nor less. No question about trust funds is raised; no fraud is charged; the sole question I am now deciding is, whether a creditor who neglects or refuses to prove his claim before the assignee, can nevertheless proceed by action in the Supreme Court, and recover a judgment. I am of opinion that when the facts, as here, are admitted on the record, that, when the estate of the insolvent and his existing liabilities are regularly before another tribunal, having full legal cognizance of it, and jurisdiction, and one specially adapted to protect the interests of a number of creditors, without a multiplicity of suits, the rights of all the creditors are thereby controlled, and the jurisdiction of the Insolvent Court, when legally seized, is paramount. I have read and carefully considered the case of *Hanley v. Greenwood*, 5 B. & A., 95, but it is decided under an Imperial Act, widely differing from our Act of 1869, and it affords little or no assistance to guide in this case. A case was cited by plaintiff's Counsel, 16 U. C. C. P., 310, but the book is not in our Library, and I have not access to it.

But the 3rd Sec. of the Act already referred to, where a schedule, form B., containing the names of all the insolvent's creditors, with the amounts due to each, is advertized, read with Sec. 145, giving the Insolvent Court full power to discharge from arrest—"any debtor confined in jail, or on the limits, in any civil suit, who may have made the assignment provided for in the 2nd section, or against whom process for compulsory liquidation may have issued"—mark the language—"made an assignment"—not "proved a claim,"—it seems to me, leaves little room for doubt that it is a good plea in bar to an action such as this; but such an assignment as the law requires or contemplates, (that is, a *bona fide* assignment, either the result of a voluntary act of the defendant, or forced from

him by attachment), precludes his creditors from a fusillade of common law actions against a man thus stripped of all means to satisfy creditors. I think that creditors who neglect or refuse to prove their debts are much as those who refuse or neglect to prove in cases of deceased insolvents. If aught remains over they may apply to the Court, as here, for the residuary fund, but they cannot disturb the decree carried out in the one case, nor, in this way, harass the debtor in the other. "*Vigilantibus, non dormientibus*," &c., is a maxim that applies in similar cases, where creditors neglect their own interests, and our judgment on this demurrer should be for defendant.

The 12 and 13 Vic., Imperial Act, Cap. 106, Sec. 182, provides expressly for cases like the present, and forbids the proof of a debt, or the entry of any claim against an insolvent's estate, without first relinquishing any action or suit brought by a creditor. There is no doubt but the creditor there may make his election. But neither the statute of 1869 nor that of 1875 has introduced this provision, which would seem to have been recognized by the earlier English Statutes. But even this statute does not provide for actions non-existing at the date of the assignment. The decision in this case must be grounded upon and controlled by the Act of 1869, and for the reasons above set forth, should be for defendant.

McLAREN v. McNEIL.

On the day when an order nisi to set aside pleas was returnable at Halifax, the defendant residing at New Glasgow, his Counsel moved at Chambers for the enlargement of the rule, on his own affidavit, setting out that the law firm of which he was a member had been informed by the attorney of defendant that they would receive by the mail of the previous evening an affidavit showing cause against the rule, but that no such affidavit had been received. It was not shown that inquiries had been made at the Post Office, at Halifax, for the letter said to contain the affidavit, or that in fact it had ever been mailed at New Glasgow.

Held, That the decision of the Judge at Chambers, refusing to enlarge the rule, should be sustained.

This was an appeal from a decision of Mr. Justice McCULLY, made at Chambers, refusing to enlarge a rule *nisi* for setting aside pleas. On a previous day in this term, Mr. Graham had moved to amend the rule for the appeal by inserting in the recital of papers upon which it was granted, a recital of a certain affidavit. On the other side, Mr. Meagher had moved on a previous day to quash the appeal for informality. The whole case with these motions, was argued at once.

Graham, in support of his motion to amend.—The decision in *Foster v. Chambers*, 1 R. & C., 254, which makes it necessary to recite all the papers relied on in the order for appeal, took the profession by surprise.

Meagher, contra.—*Chitty's Arch. Q. B. Practice*, 610, lays down the very principle decided in *Foster v. Chambers*. Cites 9 Dowl, 672. An order of a Judge at Chambers cannot be amended by the Court until it has been made a rule of Court. *Chitty's Arch. Q. B., Pr.*, 1593. This appeal is irregular in another particular. There is no proof that the bond was approved by the Judge as the Statute requires.

Weatherbe, in reply.—The Judge had the papers and filed the bond and order himself. (DESBARRES, J. There is nothing to shew that the Judge did not approve the bond.) It is rather sharp practice to endeavor to take advantage of the *laches* of the Judge, if there be any *laches* at all.

THE COURT allowed the amendment.

Graham, in support of order for appeal.—In this case the enlargement of the rule *nisi* was asked for upon an affidavit setting out that affidavits were expected from the defendant, who resides in New Glasgow. Cites *Ch. Arch. Q. B. Pr.*, 1554; 2 Dowl, 715. The rule *nisi* was only served eight days before the return day of the rule.

Meagher, contra.—It appears from the order absolute that there was an argument of the rule *nisi* before it was made absolute. The affidavit on which the enlargement was asked for, stated that an affidavit on which to shew cause was to have reached Halifax on the evening before the return day

le. Why did not the affidavit reach Halifax? The up a sham defence. (RITCHIE, Eq. J. It is of importance to know the nature of the case, as far as the pleadings disclose. The pleas here disclose no defence to this action.) The affidavit of Mr. Graham with reference to the affidavit expected from the defendant is to be construed most strongly against the defendant and it does not shew that he had gone to the Post Office to see whether the affidavit from defendant had arrived. An application for an enlargement was asked for on the last day of Chambers' session, and would have put off the plaintiff's remedy for another month. As to discretion of Judge,—cites *3 H. & N.*, 100; *10 Exch.*, 81, n.; *L. R.*, 4 C. P., 482; *L. R.*, 2 C. P., 630; *10 P.*, 738. Suppose this appeal is sustained, what defence can the defendant take by it? The appeal is not from the absolute setting aside the pleas.

ALD, J., in reply.—With regard to the pleas cites *Chipman*, 1 Oldright, 710. The judgment in that case says the veracity of the plea is the main question.

ALD, J., now, (Dec. 12th, 1876,) delivered the judgment of the Court:—

The order nisi to set aside the pleas in this cause was dated 1st day of June, 1875, served on the 5th of July following, and was returnable on the 13th of the same month. The defendant resides at New Glasgow. Mr. Graham moved at New Glasgow, on the return day of the order nisi, on his own motion for an enlargement of the order on the ground that some of which he was a member had been informed by the defendant's attorney that they would receive by the next day the previous evening an affidavit shewing cause against the order being made absolute, but that such affidavit had not been received. It does not appear that any enquiries were made for the letter, said to have contained the affidavit, at the Post Office, in Halifax, or that in point of fact it was ever received at New Glasgow. No doubt Mr. Graham stated what he knew, and he only knew that his correspondent made a statement of which was not confirmed under oath; and, with the slightest degree doubting the veracity of Mr. Fraser, he was to hold that in this case the learned Judge exer-

cised his discretion improperly, we would be setting a very dangerous precedent, which would make it an easy matter for attorneys, in all other cases, to obtain enlargement of rules, whether justified by the real facts or not. Besides this, it is quite clear that there was *laches* on the part of the defendant, and no merits whatever are disclosed. The action is upon a promissory note, and there are four pleas, all of which upon the face of them appear frivolous, excepting the one denying the making of the note, and there does not seem to be any doubt that that one is false. I see no good reason to reverse the decision of the learned Judge, and I think the appeal must be dismissed with costs.

DARLING v. McLELLAND ET AL.

The defendants, McL. and F., entered into an agreement, whereby F. undertook to "carry on and engage in the business of an auctioneer and commission merchant in the City of H., commencing said business at and from the — day of —, and to continue the same for four years, to conduct it in such a manner, to the best of his ability, as to make it remunerative, and to pay over to the said McL. one half of the net profits made upon all transactions." It was further stipulated that if at any time during said term the said McL. should become dissatisfied with said business, he might demand that the said F. should wind up and bring the same to a termination, that stock should be taken and the books and accounts submitted to the said McL., whenever required by him. In consideration of this, McL. agreed to advance the sum of \$500, "to be wholly put into and invested in the said trade or business," likewise "to procure to be discounted for the said F. different notes of hand at different times, being at such times as the said F. may require, in sums not to exceed \$2000." A further advance of \$40 per month was to be made by McL., to be expended in paying for the services of a man to assist in carrying on the said business. It was further stipulated that the said F. was to carry on said business "in his own name alone, and not to connect with it or use in any way whatever the name of the said McL., either in general business or in any transactions connected therewith," and further, "that the said agreement is not to be in the nature of a partnership nor for any other purposes or acts than those specified and set forth; nor is either party to be responsible for the debts contracted by the other in a business or private capacity."

Held, that the relationship thus established between McL. and F. was not that of partners nor of principal and agent, and that McL. was not liable for goods purchased by F. in his capacity of auctioneer and commission merchant.*

This was an action upon the common counts to recover the price of goods sold and delivered. Defence, by defendant

* The Court, after ruling as above on the construction of the agreement between the parties, proceeded to say that the plaintiff could not recover against McL., as he could be made liable, if at all, only as a secret or dormant partner, and had retired before the purchase of the goods for which the action was brought.

McLelland, (the other defendant suffering default,) under a plea of never indebted, that he was not a partner of the other defendant at the time of sale and delivery of the goods.

The cause was tried before Mr. Justice DESBARRES, at Halifax, in February, 1875, and a verdict found for defendant. A rule nisi to set the verdict aside, and for a new trial, was granted on the ground of improper reception of evidence, because the defendant McLelland was allowed to be recalled to rebut the rebuttal testimony on the part of plaintiffs, and on the ground that the verdict was against law and evidence. The rule was argued during the December Term, 1876-7.

Meagher, in support of rule.—The plea here did not disclose the defence, and plaintiff had no notice of the intention to rely on a dissolution of the partnership, until the notice from McLelland to Ferguson was produced in Court. But even after that notice there is evidence that the partnership still subsisted. In *Story on Partnership*, sec. 49, note, it is laid down as the substance of the latest decided cases that the test of partnership is whether the person carrying on the business does so on behalf of the person sought to be charged. The fourth section of the agreement of partnership provides for notice of dissolution within four years only in case of McLelland finding the business unprofitable. He should therefore in this case not only have pleaded the partnership and dissolution, but have proved that the business had become unprofitable before giving evidence of it. *1 Cr. M. & R.*, 108. McLelland does not say he did not get the benefit of those goods. He testifies to buying goods in Ferguson's name for the concern, and to going in and out of the premises, facts which go a considerable way towards holding himself out as a partner.

Bligh, (with whom was W. A. Johnstone, Q. C.,) contra.—The particulars in this action shew that the goods were bought November 20th, 1873. Ferguson's book was put in to shew that he had changed the date in the entry crediting plaintiff with goods from December 4th to November 20th. Plaintiff spoiled his own case by swearing that the goods were sold in December, after the notice of dissolution. The fourth clause of the agreement allows McLelland to terminate the partner-

ship upon becoming dissatisfied with the business. The phrase "appear unprofitable," means, to appear so to McLelland. He swears he received no profits. If McLelland had been a published partner, this notice to the other partner would not have been sufficient, but the case is different with a dormant partner. *Collyer on Partnerships*.

But defendant, McLelland, never was a partner at all; cites *L. R.*, 4 *P. C. A.*, 419. In that case the defendant sought to be charged as a partner had entered into an agreement with the other defendants by which he was to receive twenty per cent. of the profits, and yet he was held not to be a partner. Here McLelland agreed to receive a certain percentage of the profits, but did not interfere in the management of the business. Further, he swears he did not receive any profits.

W. A. Johnstone, Q. C.—The whole law as to what constitutes partnership has been changed. In 9 *Scott, N. S.*, 94, summarized in *Lindley on Partnership*, 40 to 45, after the case had been through three Courts, and decided differently in each, the final decision changed the law upon the subject, modifying the rule as to participation in profits.

But McLelland was, if a partner at all, a dormant partner *Addison on Contracts*, 87. The only requisite of a dissolution was notice to the other partner, and that notice was given in accordance with the terms of the agreement. 1 *Lindley*, 420; *Roscoe*, 531. The defendant's plea of never indebted was sufficient, because it set out exactly what the defence was, and put it upon the plaintiff to shew that he had been indebted.

Meagher, in reply.—Ferguson swears, "Stitt McLelland was a partner with me," and that is uncontradicted. Defendant's Counsel insist that page 51 of Ferguson's ledger was put in evidence. Assume that it was in; it shews that the goods were sold November 22nd, 1823, and that is not contradicted. The same page shews that McLelland got out of the business \$498 more than he put into it. The notice of dissolution is, like the certificate of an engineer, worthless unless given *bona fide*, after examination of the circumstances of the case. McLelland could not upon a mere whim dissolve the partner-

ship and deprive Ferguson of his interest in the business. The ledger was improperly admitted, and defendants should have shewn that it did not mislead the jury ; 1 *Foster and Finlayson*, 461.

SMITH, J., now, (December 12th, 1876,) delivered the decision of the Court.

This action was tried before Mr. Justice DESBARRÉS, at the February Sittings, 1875, of this Court, and a verdict found for the defendant, McLelland, Ferguson having put in no defence. The action is on the common counts to recover the sum of \$137.62, for goods sold and delivered. The real question in the cause is, whether the defendant, McLelland, is to be considered as being a partner with said Ferguson, with reference to the cause of action.

The facts are these: The defendants, McLelland and Ferguson, on the first day of June, 1871, entered into a written agreement, wherein the said Ferguson undertook to "carry on and engage in the business of an auctioneer and commission merchant, in the City of Halifax, commencing said business at and from the said day of June, and to continue the same for the term of four years, to conduct it in such a manner, to the best of his ability, as to make it remunerative, and to pay over to the said McLelland one half of the net profits made upon all transactions." It was further stipulated that, if at any time during said term the said McLelland should become dissatisfied with the said business he might demand that the said Ferguson should wind up and bring the same to a termination, and also that stock should be taken, and the books and accounts submitted to McLelland when required by him. In consideration of this, McLelland agrees to advance the sum of five hundred dollars, "to be wholly put into and invested in the said trade or business," likewise, "to procure to be discounted for the said Ferguson different notes of hand at different times, being at such times as the said Ferguson may require, in sums not to exceed in the aggregate two thousand dollars." A further advance of 40 per month was to be made by McLelland, to be expended in paying for the services of a man "to assist in carrying on

"said business." To all this were added two most significant and important stipulations :—First, that the said Ferguson was to carry on said business "in his own name alone, and not to connect with it or use in any way whatever the name of the said McLelland, either in general business or in any transactions connected therewith;" second, that "the said agreement is not to be in the nature of a partnership, nor for any other purposes or acts than those specified and set forth, nor is either party to be responsible or liable in any way or to any extent for the debts contracted by the other in a business or private capacity."

It will be necessary to enquire in the first place, in order to ascertain the legal liability of the defendant for goods furnished Ferguson during the period when such business was carried on under this agreement, what relationship was created by the terms of the contract thus made between them.

It was contended on the part of the plaintiff that the agreement was of such a character as to constitute them partners at least *quoad hoc*, and without referring at present to the notice given by the defendant to Ferguson, let us see how this position can be sustained. Undoubtedly for a very long period of time, and comparatively up to a recent date, the liability of a secret or dormant partner to third parties depended upon the question whether he participated as a *principal* in the net profits of the business. This is the law laid down by all the elementary writers to whose works we have had access. *Story on Partnership*, (5 Ed.) 105, referring to this class of cases, says, "the principles established in this class of cases are commonly applied to secret and dormant partnerships, where the ostensible partners only are known to act, and yet other persons, who are to share the profits, are held responsible as partners to third persons, although they may not be so chargeable *inter sese*. Thus, for example, if A and B should agree to carry on any trade or business for their joint and mutual account, and to divide the profits and losses between them, and A alone was to be known in the trade and business, and to be solely responsible for the debts and contracts thereof, and B was to be a secret partner,

ould, nevertheless, be deemed a partner as to third persons, and responsible to them for all the debts and contracts growing out of such trade or business. The same rule would apply in a case, where it was even expressly agreed between the parties that there should be no partnership between them, but they were merely to share the profits and losses, or the profits only, and one was to bear all the losses." And Lord ELDON is reported to have said in *ex parte Rowlandson*, 1 Rose R., 89 11; "It is impossible to say as to third persons they were not partners, the ground being settled that, if a man as a reward for his labour chooses to stipulate for an interest in the profits of the business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it."

This does not seem to be the law at present. Recent decisions have narrowed down to a very large extent, if they have entirely abrogated, the doctrine that a mere participation in the profits of a business is proof of partnership. Circumstances can now be shewn which may establish that such a participation does not create the business relationship of partnership. One of the earliest and most leading cases on the subject, in which it was elaborately discussed, is that of *Cox et al v. Hickman*, 9 C. B., N. S., 47. In *Mollwo et al v. Court of Appeals*, 4 L. Rep., P. C. A., 419, which was an appeal from the High Court at Port William, in Bengal, Sir MONTAGUE SMITH, delivering the judgment of the Committee of Privy Council, said, "the judgment in *Cox v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the termination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and intentions of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where in such participation alone, it may, as a presumption, not of law but of fact, be inferred; yet whether that relation does or does not exist must depend upon the real intention and conduct of the parties." And again he remarks, "It is certainly

"difficult to understand the principle on which a man who is
"neither a real nor ostensible partner can be held liable to a
"creditor of the firm. The reason given in *Grace v. Smith*, that
"by taking part of the profits he takes part of the fund which
"is the proper security of the creditors, is now admitted to be
"unsound and insufficient to support it; for of course the same
"consequences might follow in a far greater degree from the
"mortgage of the common property of the firm, which certainly
"would not of itself make the mortgagee a partner." "It may
"well be," he further says, "that where there is an agreement to
"share the profits of a trade, and no more, a contract of part-
"nership may be inferred, because there is nothing to shew
"that any other was contemplated; but that is not the present
"case, where another and different contract is shewn to have
"been intended." An act was passed by the Imperial Parlia-
ment, 23 and 29 Vic., c. 86, which enacts "that the advance
of money to a firm upon a contract that the lender shall
receive a rate of interest varying with the profits, or share of
the profits, shall not itself constitute the lender a partner, or
render him responsible as such." Sir MONTAGUE SMITH re-
marks, "It was argued that this raised an implication that
"the lender was so responsible by the law existing before the
"passing of the Act. The enactment is, no doubt, entitled to
"great weight as evidence of the law, but it is by no means
"conclusive; and when the existing law is shown to be
"different from that which the Legislature supposed it to be,
"the implication arising from the statute cannot operate as
"a negation of its existence."

Now, if upon the strength of this case, decided by the high-
est judicial authority in the realm, we are to arrive at the lia-
bility of the defendant as a partner of Ferguson by a
consideration of the terms of the contract between them, it
appears impossible to regard him in the light of a partner. It
is true that a state of circumstances may exist, and the nature
of the arrangement between the parties may be of such a
character, as might justify and even call for the interposition of
the Court to so construe the agreement as to prevent a party
putting forward another as an ostensible trader, when in fact
he was really an agent. But, after all, this must necessarily

e a question depending much upon the finding of the jury, s to the facts of the particular case. In the case from which I ave been quoting it was contended on behalf of the appell- nts, that, if a true partnership had not been created under the greement, the Watsons were constituted by it the agents of theajah to carry on the business, and that the debt of the laintiff was contracted within the scope of their agency. his was a point insisted upon for the plaintiff in the case efore us. I think the question of agency, in this, as in very other similar transaction, must depend upon whether a artnership really existed, unless something appears to express nd to create it. "Of course," as I find in the judgment of ie Privy Council, "if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agent must on some other ground be shewn to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established and on the same facts and presumptions."

In the light of this authority then, can it be said that the defendant and Ferguson were partners, if we are to arrive at that conclusion from "*the real intention and contract of the parties*," as expressed in their agreement?"

Dismissing from our minds the question of a participation in the profits as raising any arbitrary presumption of law in favor of a partnership, the contract does not only not create one, but expressly negatives the existence of such a relationship between the parties. To say they were partners by virtue of their contract, would be to do unquestionable violence to the very language they use to express their intentions, and to imply the relation of agency would be an attempt to create by operation of law a relation opposed to the real intention and agreement of the parties, exactly in the same manner that of partners was sought to be established. I cannot bring my mind so to construe the agreement in question, with the

recent decisions in view, as arbitrarily creating a partnership rendering the defendant liable "for goods purchased by Ferguson," nor do I see anything, when once the implied agency which flows from such a relationship of partners is removed from which it can be shewn to have existed. I find nothing in the agreement which authorizes, either expressly or impliedly, Ferguson to purchase goods as the agent or on the authority of the defendant; on the contrary the contract seems directly pointed to the prevention of such responsibility. He undertakes to advance a certain amount of money to be invested in the business, which business was to consist of that of a commission merchant, "in all the branches connected therewith," and to procure to be discounted different notes of hand at different times, and engages to do so "*for the said Ferguson.*"

If it were possible, however, to construe the agreement as constituting the defendant a partner of Ferguson, still he would remain liable only as a secret or dormant partner.

There was no evidence of the goods sold by plaintiff to Ferguson having been so sold on the joint credit of McLelland and himself and there is likewise nothing to shew a knowledge on the part of the plaintiff of McLelland's connection with Ferguson at any time before the action was brought, and therefore he could not be held answerable for any goods purchased subsequently to his retirement, and his terminating his connection with the business. He did notify Ferguson in writing on the 23rd day of November, 1873, to wind up the business, and that his connection therewith had ceased from that date. The goods on which the balance was due, and for the recovery of which the suit was brought, were purchased, according to plaintiff's own testimony, subsequently to this date. The plaintiff says, "the last goods were sold to him (Ferguson) 22nd December, 1873. The balance due me for the goods is \$137.62."

In reply to this the plaintiff sets up a verbal renewal of the connection by defendant, and abandonment of the written notice by him on the same or succeeding day to the one on which Ferguson received the notice, and this is denied by the defendant. It was contended at the argument that the written

notice was improperly received in evidence by the learned Judge who tried the cause, there being no plea on the record under which proof of the termination of the partnership could be given. I cannot arrive at this conclusion. I think it was competent under the plea of *nunquam indebitatus*, which denies the original existence of the debt to give such evidence. The goods here were sold to Ferguson at a period when no liability could possibly exist on the part of the defendant if the notice had been given and remained uncanceled. In fact there was never an original debt due from him to the plaintiff such as the plaintiff was seeking to recover. In *Payne v. Hales*, 5 M. & W., 598, and *Worrall v. Grayson*, 1 M. & W., 166, it was held that under "never indebted," to the common counts for goods sold, the defendant might prove that plaintiff was his partner in the transaction, and so in an action for goods supplied to defendant's wife, under a similar plea, the defendant was permitted to shew that she was living in adultery at the time the goods were supplied, as the agency of the wife to pledge her husband's credit was thereby disproved. *Symes v. Goodfellow*, 4 Dowl, 642.

The learned Judge left the case open to the jury on all the material facts, and I do not see anything in the objections raised that should induce the Court to disturb the verdict. I am not dissatisfied with it, and therefore am of opinion that the rule must be discharged with costs.

IN THE MATTER OF THE ARBITRATION BETWEEN WIER AND CUMMINGER.

AN agreement dated 19th November, 1874, was signed by A. W. and S. W. D. C., referring certain disputes concerning lands to three arbitrators named therein, providing that the award should be made and signed on or before the 19th day of February, 1875, and that copies of it should be served on the parties within ninety days of the date of the agreement. The award was made and signed on the 18th day of February, 1875, and copies of it served on that day, ninety-one days after the date of the agreement.

Held, that the objection that copies of the award had not been served within the time stipulated could not prevail, as the award was made and served within the time named in

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the agreement for its being made, and that, even if the objection could have prevailed in another case, S. W. D. C., who raised it here, was guilty of *laches* in allowing two terms of the Court to intervene between the serving of the award and his motion to set it aside.

Held, also, that the fact that one of the arbitrators was not present during the whole period of taking the evidence could not be made ground of objection to the award, when all the parties interested consented to the arbitrator absenting himself.

Held, also, that the portion of the award fixing fees must be set aside and the rest confirmed.

In this case a rule *nisi* was obtained on the part of Cumminger to set aside an award under a submission made a rule of Court under Chap. 109, R. S. The rule was taken out on the following grounds:—That a copy of the award was not served on Cumminger within the time, (ninety days), limited in the submission; that evidence was taken in the absence of one of the arbitrators; and that there was misconduct on the part of two of them. The rule was argued during the December Term, 1876.

Henry, in support of the rule.—The time limited in the submission for the award to be served was ninety days from the date of the agreement, Nov. 19th. The rule making the submission a rule of Court was granted June 10th, at Pictou. The terms of the submission contain no reference to its being made a rule of Court.

Graham, contra.—The affidavits of the three arbitrators and others allege that the absence of the arbitrator *Stewart* was by leave of the arbitrators and parties. The rule making the submission a rule of Court was made on the 10th day of June, 1875. A rule *nisi* for judgment was taken out on the 22nd June, 1875, and served the 25th. In England there is a statute of 9 & 10 *William III.* limiting the time within which application can be made to set aside an award, and it is under that statute that applications are made in this Court. In this case the application should have been made during the July Term in Halifax or the October Term at Guysboro'; it is therefore too late. With regard to the absence of the arbitrator, the cases all shew that notice of objection should have been given; 2 *Carrington & Payne*, 574; 2 *Man. & Grang.*, 830; 7 *Dowl.*, 389; 5 *B. & Ad.*, 488; 4 *T. R.*, 589; *Russell on Arbitrations*, 87; and that the objection is waived by the party proceeding; *Willes, Rep.*, 215.

The COURT,—There can be no doubt on that point. Four affidavits show clearly that there was an assent to the absence, and that the arbitration went on.)

Thomson's Rep., 155 and 157, and *Russell on Arbitrations*, 307 and 308, shew that the valid part of an award may be sustained, and the void part rejected. The arbitration may go on in the absence of one arbitrator, if he has had notice of the meeting; *Russell*, 648.

Henry, in reply.—The Statute of William III. only refers to notions to set aside an award on the ground of corruption or undue practice. The first objection to this award is that it was not made within the time limited in the submission. In the matter of *Swinford v. Horne*, reported in *1 M. & Sel.*, 226, it is shewn how strictly provisions of this kind must be carried out. With regard to notice of the rule of Court, there is nothing to shew notice but the service of the rule *nisi* for judgment, which recited an affidavit which referred to the rule of Court. Even in case of a submission providing for the award being made a rule of Court, it should be served; still more where, as here, the submission contains no such provision. Where the submission contains no such provision, the party who is served with a rule *nisi* to enter judgment should not be compelled to come a hundred miles perhaps to see whether the cause is in Court. The rule was served on the 14th of October last; this application is not too late, because the time should commence at that date.

MCDONALD, J., now, (December 12th, 1876,) delivered the judgment of the Court:—

The argument in this case was upon a rule *nisi* obtained by Cumminger to set aside an award made under an agreement signed by him and Wier, and dated the 19th day of November, 1874, whereby they referred disputes respecting lands to three arbitrators named in the agreement, or a majority of them. The award was to have been made and signed on or before the 19th day of February, 1875, and copies of it were to have been served on the parties within ninety days from the date of submission. Each party was to pay his own witnesses, and the loser to pay all other necessary expenses. The award was

signed by two of the arbitrators on the 18th day of February, 1875, within the time limited for making it, and a copy of it was served on Cumminger, but not within the ninety days. The submission was made a rule of Court on the tenth day of June, 1875, at the instance of Wier, and a copy of the rule therefor was served on Cumminger on the 14th day of October, 1875. The rule *nisi* now under consideration to set aside the award is dated the 15th day of December, 1875, and the grounds are that a copy of the award was not served on Cumminger within the time limited, (the 90 days); that evidence was taken in the absence of one of the arbitrators, and misconduct of two of them.

That part of Cumminger's affidavit which relates to evidence having been taken in the absence of one of the arbitrators is fully met and answered by the affidavits of all the arbitrators, and of Wier and others, who proved that before the arbitrator absented himself, all the parties interested, Cumminger among them, consented that he might do so, and that no objection should be taken on that ground. It also appears by the affidavits that the evidence was taken in writing and read over to the arbitrator after his return, and that both parties without any objection proceeded with the arbitration after the alleged irregularity.

There is nothing whatever to shew misconduct on the part of the arbitrators; and upon the question of the award not having been served within ninety days, it must not be forgotten that the arbitrators had until the 19th day of February to make their award, and that they made it and served a copy of it on Cumminger on the 18th. It is true this is more than ninety days after the date of the submission, but it would be absurd, to say the least of it, to require service of a document in writing before the time agreed upon to put it in writing had expired. It is not necessary however to decide the case upon that point solely, as any irregularity that may have occurred has been waived by the *laches* of Cumminger, who after having been served with a copy of the award on the 18th of February, and with a rule *nisi* for judgment on the 25th of June, took no steps to set aside the award until the middle of December following,—two terms of the Court having been

the County between the service on him of a copy of writ and his moving in the matter.

The parties had a right under our Statute to have the arbitration made a rule of Court, and Cumminger ought to have taken proceedings at an earlier date if he thought that there were irregularities. Not having done so nor accounted for the delay, he cannot now succeed in this application. Although the agreement provides that the losing party shall pay the expenses of the arbitration except the witnesses' fees, it gave no power to the arbitrators to tax costs or fix fees for witnesses or others. That must be done in the ordinary way and in undertaking it they exceeded their authority. To the extent the award is inoperative, but as far as it relates to matters submitted to the arbitrators it cannot be set

PUGH ET AL. v. WYLDE ET AL.

The plaintiffs agreed with with McF. of St. George's Bay, Nfld., to sell him certain goods, which were re-shipped on board a vessel bound for that place, Plaintiffs taking a bill of lading in full form, but in which the goods were made deliverable to the shippers' order, one copy of the bill of lading being given to McF., or sent to him by the vessel. Plaintiffs treated the goods as their own property, but the Court (Wilkins and McDonald, J. J.,) drew from the evidence the inference that both the vendors and the vendee had treated McF. as the owner of the goods during the transit and at the time of the loss. Having taken a note from McF.'s brother as collateral security for payment of the debt and the plaintiffs' testimony, designed to show that the goods had not been paid for by McF., being considered doubtful and unsatisfactory.

That although the fact of the goods being made deliverable by the bill of lading to the order of the shippers, *prima facie* indicated that they intended to reserve the right of reshipping the goods it was not conclusive; that the sale was complete when the goods, were delivered according to McF.'s order, and that the plaintiffs had no insurable interest.

There was an action on a policy of insurance on goods shipped from St. George's, Nfld., taken out by Pugh & Sons, for the benefit of whom it might concern. One of the main grounds of defence was deviation, but that was abandoned. The money was payable to Pugh & Sons, and a bond taken from them to hold the insurers harmless. The question was whether Pugh and Sons had a right to the money. There was also a question whether the preliminary proofs of loss were sufficient. The

cause was tried and a verdict found for plaintiffs. The rule to set it aside and for a new trial, was argued during the December Term, 1875-6.

Henry, in support of rule.—A contract of insurance is one of indemnity and nothing else. The plaintiff here had no interest. It appears clearly from the evidence that there was an ordinary sale of the goods. He says he shipped these goods, and that he was the owner, but that was before the sale. That language must be controlled by the statements of the other witnesses who prove that the goods were sold. There is no averment of interest in the declaration except that he insured for himself. He could not under that recover on the ground that he insured at the request of another person. The statement that the bill of lading was made out to the order of the shipper applies only to the bill as drawn originally, merely as a matter of convenience. It was of course endorsed to the vendee. 1 *Phillips*, § 294; 2 *B. & P.*, 269. It should have been put to the jury to say whether Pugh was interested in the goods and how.

Weatherbe, contra.—The merits of this case are not with the defendants. They did not intend to take any defence except deviation, until they found that they could not prove any deviation. Pugh swears that the goods were not charged to James McFatridge. If they were not his goods, who had an insurable interest? They were not the goods of William McFatridge. Pugh swore that the goods were his, and that was put to the jury. The recent English cases show that even where the vendor parts with the possession of goods he has an insurable interest so long as he has a right of stoppage *in transitu*. Cites 1 *Parsons on Marine Insurance*, 232; 21 *L. T. R.*, 36.

(RITCHIE, E. J. If you claim an interest on the ground of a right of stoppage *in transitu*, you must show the amount. There is evidence that notes were given for the value of the goods, on which payments were made.)

Weatherbe.—There is proof that the notes covered other things besides these goods, and there is no evidence at

all to show that the payments alleged were made on account of these goods. The evidence is that there was a larger amount still due than the value of these goods. The Plaintiff had the right to distribute the payments as he chose, and if the amount remaining due is still in excess of the value of the goods, he had a perfect right to treat the goods as not paid for.

Henry, in reply.—There is a plea on the record which obliges the plaintiff to prove his interest. He has shown no interest at all. The plaintiffs have not made it clear that they were the owners absolutely of the goods when the risk commenced. As to the right of stoppage *in transitu*, the law cited is merely a *dictum* of the text-writer. Admitting that it is an insurable interest, it must be shown what that interest is, and the plaintiff must prove his loss. There is no stoppage *in transitu* in this case at all. The insurable interest accruing through a right of stoppage *in transitu*, if it exists at all, can only attach after the insolvency of the vendee gives the right of stoppage *in transitu*. A lien is a presumption that can be rebutted by the slightest proof of collateral security. The plaintiff admits that the goods were charged. He says he handed a certain person a statement taken from the invoice of the goods, and from James McFatridge's account.

RITCHIE, E. J., now, (December 12th, 1876), delivered the judgment of the Court :—

The only ground upon which the verdict can be set aside in this case is the want of an insurable interest in the plaintiffs. They are merchants doing business in Halifax, and agreed with one James McFatridge of St. George's Bay, Newfoundland, to sell and ship to him certain goods which he ordered ; they were accordingly shipped on board the schooner "*Maud*," bound for that place, which, after leaving this port, was never heard of. The plaintiffs took a bill of lading from the master in the usual form, the goods under it being deliverable to the shippers' order, one of the copies of which was given to McFatridge, or sent to him by the vessel. The insurance was effected by the plaintiffs on the goods as their

property and for their protection ; it was therefore necessary for the plaintiffs on the trial to shew that they possessed such an interest in the goods as was insurable, and as all the circumstances connected with the transaction were within their personal knowledge, and they were both examined, and they alone on this branch of the case, the Court had a right to expect clear and satisfactory proof that the goods were theirs, or that they had such an interest in them as enabled them to insure them for their benefit ; but after carefully considering the evidence of the plaintiffs themselves, I can come to no other conclusion than that when the goods had been shipped, and had proceeded on their voyage, the plaintiffs had parted with all their interest in them, the vendee having become the owner, and that they were then at his risk. The real question for our consideration is, at whose risk were they during their transit, and this appears to me to have been the view taken of the matter by both the vendors and vendee, and on which they acted, the vendors looking since the loss to the vendee for payment, and the latter recognizing his liability by paying or settling for them. This is the inference to be drawn from the evidence. John Pugh, one of the plaintiffs, in his evidence, says, "James McFatridge ordered the goods ; they were shipped on his credit, they were charged in the books, not to him," He does not say to whom they were charged, and it is difficult to imagine to whom else they could have been charged under the circumstances. He goes on to say that, some time after, McFatridge's brother William gave them a note as a collateral security for the liability of the former, but at the time of giving the goods he had no conversation with James respecting his brother William ; *"he couldn't say he received payments on the goods."* On this subject I think he should have been most clear and explicit. He adds,—there were payments on the note, either payments or renewals, by which the note was settled up. It is evident from this that the sale and purchase was not repudiated by either party, but McFatridge is recognized as the owner of the goods at the time of the loss, and that they were at his risk, and not at the risk of the plaintiffs. The other plaintiff, John

Pugh, says, "*I cannot say whether the goods in question have not been paid for.*" That, it appears to me, coming from a plaintiff, would seem of itself to settle the question. He afterwards said, "James McFatridge never paid us any money in account of these goods." This may simply mean that there were no cash payments, but it is not very easy in any way to reconcile the evidence given on this subject. He afterwards refers to payments as having been made to them, it says *he thinks* they were not made on the note referred to. Nothing can be more unsatisfactory than this testimony, and the plaintiffs must have been able to have made the matter clear and satisfactory. It is unfortunate that they did not produce their books when called upon to do so,—they had time enough to do it after notice, if they had been so disposed, for they would have thrown light on the transaction, but, whether produced or not, it was incumbent on the plaintiffs to explain it satisfactorily in order to establish their right to recover.

Much stress was laid at the argument on the fact that the bill of lading made the goods deliverable to the shippers' order, but, under the circumstances, that does not appear to be entitled to very much consideration. Mr. Pugh does not pretend that on their arrival they were not to be received by McFatridge, or that he had any agent at St. George's Bay to receive or control them, or that he had given any special instructions to the master of the vessel, or that any act was to be done by McFatridge before he should be entitled to receive them, but he hands or sends in the vessel to him a counterpart of the bill of lading. No doubt where a bill of lading makes goods deliverable to the order of the shipper it *prima facie* indicates that he intends to reserve to himself the ownership and the right of transferring the goods by endorsing but it is by no means conclusive. The real question is open for proof, which in this case is whether these goods had wholly passed into the vendee, and that depends upon the agreement and intentions of the parties as shewn by their acts. If in this case McFatridge had actually paid for the goods in full before they were put on board under his directions, what pre-

tence could the plaintiffs have had to any interest in them merely because they had chosen to take the bill of lading on the terms they did? Surely none. It is a well-established rule of law that if one orders goods to be sent to him and there is no agreement to the contrary, the moment they are delivered to the carrier such delivery operates as a delivery to the purchaser and the whole property is vested in him, so that if any accident happens to them, it will be at the risk of the purchaser, unless sent by an unauthorized mode of conveyance. See *Dutton v. Solomanson*, 3 Bos. & Pul., 582; *Dawes v. Pect*, 8 T. R., 330; *King v. Meredith*, 2 Camp, 639; *Sweeting v. Turner*, L. R., 7 Q. B., 310.

The sale in this case was, I think, complete when the goods were shipped in accordance with McFatridge's order; it is not denied that they were sold on credit, as the plaintiffs before and since have been dealing with him. McFatridge would have had no right to refuse to accept the goods on their arrival, and there was nothing in the terms of sale which would have given plaintiffs a right to withhold delivery, and they could not legally have done so unless in the event of the vendee's insolvency, when the right of stoppage *in transitu* would have arisen, a right only exercisable in that event, and therefore they had no insurable interest in them. The case of *Anderson v. Morice*, first decided in the Common Pleas, L. R., 10 C. P., 58, and afterwards in the Exchequer Chamber, L. R., 10 C. P., 609, where the judgment given in the C. P. was reversed, though the circumstances are somewhat different, is very applicable in principle to that before us. The plaintiff there had agreed for the purchase of goods, the ship sank while in course of taking them aboard, and the larger part of the cargo, which was rice, was wholly lost; the Court held that the plaintiff had no insurable interest in the rice, inasmuch as it was not at his risk under the contract of sale until the loading was completed; it was conceded that if the whole cargo had been on board it would have been at his risk, and he could have insured it.

BLACKBURN, J., in giving judgment for himself and LUSH, J., said: "As the policy of insurance is a contract of indemnity,

the plaintiff cannot recover unless he suffered a loss from the perishing of the rice, and that loss was such as to be included in the subject matter of the insurance, as described in the policy. The first question to be determined is, whether the plaintiff was so situated with respect to the rice in question at the time of its loss that he would, if uninsured, have suffered any loss from its destruction. It may be observed that risk and property generally go together, and consequently, in many of the cases, though the important question is, at whose risk was the thing, it is treated as if the sole question was, whose property is it? In the present case, however, the real question is, at whose risk was it? And we do not, therefore, attach any weight to the stipulation that the seller was to attach the shipping documents to the drafts, thereby certainly preserving to the seller a lien on the goods till the drafts were accepted and the bill of lading handed over, and perhaps preserving in them, till then, the property, so as to enable them to confer a title on a purchaser for value without notice as good in equity and preferable at law to that of the plaintiff. *This would not prevent the risk from being on the purchaser from the time the loading was complete.* We have come to the conclusion that the rice was not at the plaintiff's risk, and he could never have been called upon to pay for it notwithstanding its loss." And BRAMWELL, B., giving judgment for himself and POLLOCK, B., concurred and said, "The defendant below is entitled to judgment, on the ground that the plaintiff below has shewn no interest in the subject matter of the insurance at the time of the loss," and on page 623, "as to the argument that the plaintiff had an option to take the rice, which he might exercise after it was lost, we cannot agree to it. It seems strange that it should rest with the plaintiff to make the underwriters liable or not at his pleasure. But the plaintiff had no such option. No doubt it exists in some cases, and one party to a contract may have a right to insist on performance or refuse to perform at his option; but that is *where there has been some default in the other party.* Here there has been none."

I cannot entertain a doubt but that when the plaintiffs, under the instructions of the purchaser, put the goods in

question in this case aboard the vessel to convey them to their destination, they were relieved from all risk or responsibility in regard to them, so that if lost in the course of the voyage, the loss would fall on the purchaser, from whom the plaintiff would be entitled to recover the price; and while the purchaser had a right, if he had thought fit, to insure the goods, the plaintiffs had no insurable interest in them, and cannot recover in this action under the evidence adduced. The rule *nisi* should be made absolute.

DESBARRES, J., and SMITH, J., concurred.

WILKINS, J., read the following dissentient opinion:—

At the close of plaintiffs' case a motion for non-suit was made, and the only ground taken was "that no proof of loss was exhibited."

The learned Judge who tried the cause put the plaintiffs' case to the jury on the testimony of John Pugh, that the property which was the subject of insurance was in the plaintiffs, and on the effect of the Bill of Lading, which made the goods deliverable to *their* order, and he characterized these two things combined as constituting sufficient evidence, if believed, to warrant the jury to say that the plaintiff had such interest. The jury so found; and, although I think the evidence of ownership not so clear as it might have been made by testimony exhibiting how, at the times of insurance and of loss, the matters of account stood between the plaintiffs and James McFatridge, nevertheless, I am not prepared to say that the verdict ought to be set aside on the ground that plaintiffs did not show an insurable interest. It appears to me that they did sufficiently shew it, because their proof positively asserted the fact, and because that positive assertion was not necessarily impaired in its force by anything elicited by cross-examination, or by evidence to the contrary adduced on the part of the defence. John Pugh swore in these words: "The goods belonged to us and were insured for our protection." I am unable to say that that statement was qualified, or the proper effect of it as evidence materially weakened, by the circumstances under which the note of William McFatridge was given, or by the fact that the Plaintiffs had, before the loss

and after the time of it, other dealings with James McFatridge than those which respected the debits against him of the particular goods, or by the possible but unproved fact, that, before the loss, he may have discharged himself from his indebtedness in respect of the particular goods. I do not see that the testimony thus referred to, viewed as a whole, even without the document, did not warrant an inference that the plaintiffs had the interest in question.

The language of the bill of lading in the point relied on by the plaintiffs is not, of course, conclusive to shew property in the plaintiffs, to whom the goods were to be delivered, on arrival at their destination, but, coupled with the positive testimony of ownership, it appears to me to be evidence of weight to affect the minds of a jury. Suppose the vessel had arrived at Bay St. George, and plaintiffs had an agent there. Suppose too, that the agent, being telegraphed to by his principals that McFatridge's credit was doubtful, and therefore to act, had stopped and taken possession of the goods for his principals, and to secure them. There is nothing in the evidence of facts before us to show that they couldn't have so acted by him, and, if they could, it follows, that the plaintiffs had the interest which they asserted in this action. It does appear to me that the verdict should be sustained.

MCDONALD, J., also read the following dissentient opinion :—

The question in this case is not whether McFatridge, the purchaser of the goods insured, had acquired an insurable interest in them ; but whether or not the plaintiffs, who were the vendors, parted with their right to and interest in the property. There was no memorandum in writing of the sale of the goods, which were not even charged to the purchaser, though there appears to have been some entry of them in the books. Nothing was signed by James McFatridge, the purchaser, and no money was paid at the time of the purchase. In order to ascertain whether or not the plaintiffs parted with their interest in the property, we must see whether, under all the facts proved, there was a delivery of the goods to the purchaser. By the bill of lading, which was not endorsed, the goods were to be delivered to the order of the plaintiffs,

who testify that the property was theirs, and that they insured it for their own protection. If the vessel, instead of being lost had arrived at her port of destination, and the master had refused to deliver the goods insured to the plaintiffs on demand, can there be any doubt that they (the plaintiffs) would have a right of action? On the other hand, could James McFatridge, to whom the property was never actually delivered nor even charged, succeed in any action against the master for non-delivery. It appears to me, and I have no doubt that the jury took the same view of the case, that the plaintiffs took the bill of lading, requiring the goods to be delivered to their own order, to prevent the ordinary rule of law from applying, namely, that the delivery, to a sailing master, of goods to be carried to a purchaser under a bill of lading for that purpose, not as in this case—is a delivery to the vendee; This they had a perfect right to do, if that was their intention, so as to keep the goods under their own control till they thought proper to deliver them, which would be entirely in their discretion, as there was no binding agreement otherwise to transfer the property. I think that the evidence does not show a delivery of the goods or that the plaintiffs parted with their interest in them. It is true that there is evidence that William McFatridge, a brother of the vendee, gave a promissory note to the plaintiffs, which one of them says was a “collateral security,”—“A mere accommodation note,” and that the note was settled up either by payments or renewals, but that must have been after the policy was effected, and after the loss occurred, if we give due weight to the evidence. I think that McFatridge was not liable to pay the plaintiffs and probably would not have paid, if the facts, as proved, were within his knowledge. His doing so, however, cannot affect the enquiry whether or not when the loss occurred the plaintiffs had parted with their interest in the goods. If the transfer of interest had been after the loss the underwriters could not resist the claim. (*Sparkes v. Marshall*, 2 Bing. N. C., 76.)

The jury have passed upon the question of fact, and I think there is ample evidence to justify the verdict.

OUTRAM v. SMITH.

Plaintiff brought action on a policy of insurance on certain goods purchased from him by one McM., who gave his promissory notes, made payable to Plaintiff, in payment. The goods were of the invoiced value of about \$1100, and were insured for \$1400, which plaintiff explained was to cover the anticipated profits. By McM.'s directions the goods were sent to the *Cordelia* for shipment, and a bill of lading was taken stating that they were shipped by plaintiff in the *Cordelia*, bound for Margaretville, to be delivered to McM., or his assigns, he or they paying freight. Instead of being taken to Margaretville they were landed at Moser's Island, and the vessel taken a few miles out and sunk, all of which was at McM.'s instance. In his writ plaintiff set out that he and McM., or one or other of them was at the time of the loss interested in the goods, and that the insurance was made for the benefit of the person or persons so interested, and on the trial evidence was given tending to show that no sale or delivery to McM. had actually taken place, that McM.'s purchase was a fraud on plaintiff, and that he was to have procured a second name on the notes. The Jury found these facts in answer to questions put to them, and they found a verdict for plaintiff, subject to the opinion of the Court.

Held, that plaintiff could not recover without shewing that he was the owner of the goods, that the facts in proof shewed an absolute sale and delivery to McM., that even if McM. had obtained the goods by false representations (i. e., as to the additional name to be procured on the notes), yet the property vested in the vendee until the plaintiff had done some act to disaffirm the transaction, and that the verdict must be set aside.

RITCHIE, E. J., now (Dec. 12th, 1876,) delivered the judgment of the Court :—

This is an action on a policy of insurance brought by the plaintiff for the recovery of a loss on certain goods shipped on board a vessel called the *Cordelia*, bound for Margaretville. The insurance was effected by the plaintiff on the goods which had been purchased from him by George W. McMahon, for \$1096.68, for which amount he gave his notes at two and three months, which were credited on the plaintiff's books to McMahon, thus :—

Cr.	By bills receivable, his note at 60 days...	\$ 548.34
	“ “ “ 3 mos....	548.34
		\$1096.68

The plaintiff says that McMahon was to have given him another name on the notes, but failed to do so. The notes taken were from McMahon to plaintiff, and, if indorsed, would not have given the plaintiff additional security, and it does not appear that the plaintiff, who drew them intended that another should sign them as a joint maker, as they are both drawn as if to be the notes of one person, “I promise to pay.”

The goods were sent, by McMahon's directions, to the *Cord* for shipment, and a bill of lading was taken from the *Ma* which stated that they were shipped by the plaintiff in vessel, bound for Margaretville, and were to be delivered McMahon or his assigns, he or they paying freight for the goods. The amount insured was \$1400, which exceeded the invoice price of the goods. This, the plaintiff says, was done to cover the anticipated profits on them at Margaretville. Of the goods a portion to the value of \$907.28 were in bond having paid duty, and were taken out on the usual terms. After the vessel left Halifax, instead of proceeding on voyage to Margaretville, she was taken to Mosher's Island where her whole cargo, including the goods in question, was landed there in the night, after which she was taken out through four miles and sunk. All this was done at the instance of McMahon, by whom the master of the vessel had been engaged.

In his writ the plaintiff alleges that the plaintiff and George McMahon, or one of them, at the time of the insurance, and thence and until and at the time of the loss, were or was interested in the said goods, and the said insurance was made for the use and benefit and on account of *person or persons so interested*. If McMahon was the person so interested, and the insurance were effected on his behalf, there could of course be no recovery on the policy. There was then no barratry, and indeed no loss of the goods, which were landed safely for him and at his request at Mosher's Island. To enable the plaintiff to recover he must shew that he was the owner of the goods, and that at the time of the insurance and loss they were at his risk. If McMahon as an unpaid vendor he would have had no insurable interest, as on the sale and delivery he would have ceased to be the owner. The attempt on the trial was to shew that no sale and delivery had actually taken place, that McMahon's purchase was a fraud on the plaintiff, and that McMahon promised him to obtain a second name on the policy. These facts the jury found in answer to questions put to them by the Court, and they found a verdict for the plaintiff, and

to the opinion of the Court. It was also contended on the trial that the goods had not been delivered at Halifax, but were deliverable at Margareville.

That McMahon has been guilty of a gross fraud is unquestionable, but I see nothing whatever to lead to the inference that it was, or was intended to be, perpetrated on the plaintiff. He had given his notes, and these he was bound to meet, whatever happened to the goods. The fraud was concocted and carried out to cheat the revenue, and I doubt not the insurers also, for it appears clear to me that the object of this insurance was to protect McMahon in case of loss, and to protect the plaintiff, not as owner of the goods, but as a creditor, who, in case of the loss falling upon his debtor, would be in funds from the insurance to pay himself. How otherwise can we account for his stating in the writ the interest to be in both, or in one or other of them. The law requires that the interest in the subject of the policy should be stated in the writ to be in the person for whom the plaintiff is suing. This he has not done; he is suing, his counsel say, in behalf of himself; but he has not stated in his writ that the interest was in himself or that he is suing on behalf of himself, and I cannot see if the insurance was effected for the plaintiff how the anticipated profits on the goods at Margareville could have been included in the insurance. Those profits could have belonged alone to McMahon, and in case of a loss the amount insured on them could only be recovered by him.

I can arrive at no other conclusion than that an absolute sale and delivery of the goods had taken place when the notes I have referred to were given and credited in the plaintiff's books, and the goods sent by McMahon's direction to the *Cordelia* and shipped on board of her, deliverable to him at Margareville. If another name had been originally promised on the notes it would seem to have been dispensed with, for though McMahon remained in Halifax, and the plaintiff saw him there a week after the sailing of the vessel, he neither asked for another name nor complained of not having got it; there is certainly no evidence that the delivery of the goods was not to take place till the additional security was given. If,

however, McMahon had obtained possession of the goods from the plaintiff on false representations, yet the property vests in the vendee, under such circumstances, until the vendor has done some act to disaffirm the transaction. See *Kingsford v. Merry*, 11 Ex., 577, and *1 H. & N.*, 503; see also *Pease v. Gloahec*, L. R., 1 P. C. C., 219.

The plaintiff in this case did not repudiate the sale and delivery, but has treated McMahon as his debtor on the notes, and after the alleged loss put them in suit and obtained a confession of judgment for the amount from McMahon. If we view this as an ordinary sale, independently of any question of fraud, there are no grounds for the contention that there was no delivery at Halifax, and that there would be no delivery to McMahon till the arrival at Margareville, so that till then the property remained in the vendor. The rule of law on this subject I have adverted to in *Pugh v. Wylde*, (*Ante* p. 177,) which is that if a person orders goods to be sent to him and there is nothing said to the contrary, whenever they are delivered to the carrier it operates as a delivery to the purchaser. What took place in this case amounted to an actual delivery to McMahon, and from the time of such delivery the goods were at his sole risk. Surely, if the goods had been lost, and there had been no insurance, the plaintiff could have recovered on the notes, and if so they were at the vendee's risk and not at his, and the important question is at whose risk they were. The rule *nisi* to set aside the verdict should, in my opinion, be made absolute.

WALLACE ET AL. v. ROSS.

Plas of justification under authority of the Crown sustained. Decision in *Evans v. Ross* (Vol. I., p. 165,) sustained.

The argument in this cause, which took place during the

December Term, 1875-6, was upon demurrers to certain of defendant's pleas. The plaintiffs' declaration set out ;—

That on or about the second day of June, A.D. 1874, they were the owners and in possession of a certain steam dredge, five scows, and a quantity of tools and other articles on board said steam dredge, all of great value, to wit, of the value of thirty thousand dollars and upwards, that on the said second day of June the defendant with a large number of men forcibly and unlawfully seized and took the said steam dredge, scows, tools and articles on board said steam dredge, and forced possession thereof from the plaintiffs, and drove said plaintiffs and their men out of the said steam dredge, and struck and beat said Thos J. Wallace, and afterwards unlawfully and illegally sold and disposed of the said steam dredge and one of said scows, and the said tools and other articles at public auction ; that the plaintiffs, at the time of such seizure, had the said steam dredge engaged in dredging and were then earning from three to five hundred dollars per day profit with the same, and could have earned between that time and the present a large sum of money, to wit, thirty thousand dollars, and could be still earning from three to five hundred dollars per day, had the defendant not so wrongfully and illegally seized and sold the same ; that the plaintiffs were at the time possessed of and owned a large amount of personal property in connection with the said steam dredge and intended to be worked up and used in the performance of contracts undertaken by them with said steam dredge, and also were possessed of and owned several scows of no use, except to be employed in connection with said steam dredge, all which personal property and scows have in consequence of such illegal seizure become utterly useless and of scarcely any value to the plaintiffs, whereas, had the defendant not so illegally seized and sold said steam dredge, they would have been of great value to the plaintiffs, to wit, of the value of fifteen thousand dollars, that in consequence of such illegal seizure the Plaintiffs' credit was greatly injured and impaired, and they were sued and the plaintiffs have ever since been and still are kept out of possession of said dredge by the defendant, and out of the use thereof to their great loss and damage.

And also that the defendant seized and took a certain steam dredge, five scows and a quantity of tools and other articles on board said steam dredge of the plaintiffs, of great value, to wit, of the value of thirty thousand dollars, and with which steam dredge, scows, tools and other articles on board said steam dredge, the plaintiffs were engaged in dredging, and then intended and were about to dredge for certain reward and remuneration to be therefor paid to them, and then carried away the said steam dredge, scows, tools and articles on board of said dredge, and kept and detained the same from the plaintiffs for a long space to wit hitherto, and converted and disposed thereof to his own use and thereby the plaintiffs were hindered and prevented from dredging with the said steam dredge, scows, tools, and other articles as aforesaid, and thereby lost and were deprived of all the profits, benefit and advantage which might have and would otherwise have arisen and accrued to them therefrom, and thereby the plaintiffs were hindered and prevented from fulfilling certain contracts entered into by them to dredge with the said steam dredge, scows, tools and other articles on board said steam dredge, and suffered loss and damage in consequence thereof, and thereby a large amount of personal property of the plaintiffs, which could only be used in connection with said steam dredge and which the plaintiffs then intended to be worked up and used in the performance of certain contracts entered into by them to dredge as aforesaid, were rendered useless and of scarcely any value.

And also that the defendant seized and took the plaintiffs' goods, that is to say, one steam dredge, scows, tools and implements on board of said steam dredge, and carried away the same, and disposed of them to his own use.

To this declaration the defendants pleaded among other pleas as follows: And the defendant for a third plea, first averring that the alleged trespasses in the first, second and third counts of the plaintiffs' declaration are for one and the same cause of action, and for a plea thereto says that he did not unlawfully and illegally sell and dispose of the said steam dredge and one of said scows, and the said tools and other articles at public auction

as alleged. The sixth plea was substantially the same as the fourth plea in the case of *Evans v. Ross*, which may be found on page 166 of Vol. I. It was demurred to on substantially the same grounds taken in the demurrers to the fourth plea in *Evans v. Ross*, which may be found on page 170 of Vol. I.

To the third plea the plaintiffs demurred as follows: And the said plaintiffs, as to the defendant's third plea, which is pleaded to the third count of plaintiffs' declaration, say it is bad in substance for the following reasons:—

Because the defendant has thereby tendered an immaterial issue.

Because the defendant in said third plea has not confessed and avoided, or traversed and denied any matter of fact alleged by plaintiffs in said third count, to which said third plea professes to be an answer.

Because the said third plea is not an answer to said third count.

Because it is not in any way alleged in said third count either in whole or in part that the defendant did unlawfully and illegally sell and dispose of the said steam dredge and one of the said scows and the said tools and other articles at public auction.

This cause being called for argument,

McDonald, Q. C., for plaintiffs, suggested that, as the plaintiffs in *Evans et al. v. Ross* had given notice of appeal, and had not yet made up their minds as to perfecting their appeal, the argument of the demurrers in this cause, in which the same questions were involved, should be postponed until the plaintiffs decided whether they would perfect their appeal or not.

McCoy, for defendant, objected to this course.

Weatherbe, in support of demurrer.—The defendant's third plea, pleaded to the first three counts of plaintiffs' declaration, alleges that the defendant did not unlawfully and illegally sell and dispose of said steam dredge, etc., by public auction as alleged. That plea, averring, as the two former pleas do, that the first three counts are for substantially the same cause of action, is

to be taken as if it had been pleaded separately to the first, the second, and the third counts. The statute which allows one plea to be pleaded to several counts, averring that they are for the same cause of action, merely saves the manual labor of copying out the same plea once for each separate count. Now the third count alleges that the defendant took the steam dredge, etc., and kept and converted the same. The third plea, I admit, is a good plea to the first and second counts; but it is a bad plea to the third count, which says nothing about selling at auction. The plaintiff says, "You took and kept and converted my goods to your own use," to which the defendant pleads, "I did not sell them at public auction." The plea raises an immaterial issue, which the Judge would be bound to put to the jury if we went to trial on these pleadings. It is the same as if we sued on a promissory note and for goods sold, and defendant pleaded to the whole action that he did not make the note.

McCULLY, J.—Might you not have proceeded under the Statute to have the plea set aside as regards the third count?

Weatherbe.—No; because we could not swear that the first three counts are not substantially for the same cause of action. The cause of action set out in all three counts is substantially the same, and is merely set out differently.

DESBARRES, J.—If the third count stood by itself, the third plea is certainly not an answer to it.

Weatherbe.—Precisely. I will admit for the sake of argument we could not prove a sale. In fact the Government own and run the dredge to-day. Would it be enough for defendant in answer to our count for trover to say we will prove we did not sell at public auction? The Statute referred to does not compel us to act under it; it merely says we "may," and I may add that I never heard of anybody acting under it.

McCoy, contra.—There are three counts in this declaration—two in trespass and one in trover—the last being also virtually for trespass. Under our Practice Act, sec. 179, the defendant is enabled by his plea to limit the plaintiff to one trespass and to plead one plea thereto, which I have done in this instance.

There are four trespasses alleged in the declaration, two in the first count, one in the second, and one in the third. The plea states they are all for *one trespass*, and selects that trespass, viz., the trespass of selling the plaintiffs' goods, and denies it. The plea virtually says, the only trespass you charge me with is selling your goods, and that I did not do, and if we were to go down to trial the plaintiff could only give evidence of the one trespass. *Rosc. N.P. Ev.*, 804; *Gale v. Dalrymple*, Ry. & M., 118; *Gibson v. Hawkey*, Id., 121.

It may be said that the gist of the trespass in the first count is the taking of the plaintiffs' goods, and that the selling of them is a mere matter of aggravation. But the defendant has treated it as a substantive trespass, to which he has pleaded, and the plaintiff is now bound to consider it such; *Lane v. Discon*, 3 C. B., 776. It is not one of the grounds of demurrer that the selling is not a substantive trespass.

An attempt is now made to apply this plea to the third count. If the plaintiff can do this, why not apply it to the first or fourth count? He would have an equal right. This plea states "that all the counts are only for one trespass substantially and for a plea thereto, &c." How can it be said that under this plea there are *three counts*? If so, then the plaintiff would be entitled at the trial to give evidence of three trespasses, and the 179th section of the Practice Act would be a complete nullity.

If the defendant's plea has limited or mistaken the plaintiffs' cause of action—then the plaintiff must new assign; *B. & L.*, 653; *Rogers v. Constance*, 1 Q. B., 77. The plea passes by all the trespasses stated in the declaration and singles out one, states *that* as the only trespass, and answers it, and if the plaintiff desires to proceed for those not pleaded to, he must restate his cause of action by way of a new assignment. *Hall v. Middleton*, 4 A. & E., 107; *Monkman v. Shepherdson*, 11 A. & E., 411; 2 *Campb.*, 176; *Addison on Torts*, 969.

It may be said that the defendant has only the right to select and limit the plaintiff to one trespass, when he intends to plead a plea of justification. But our Act does not limit the defendant to this, but enables the defendant in pleas of denial

as well as justification to say that all the counts are for one trespass and deny that trespass; *1 Waterman on Trespass*, 222.

But admitting that this plea does not limit the plaintiff to one trespass, then the plea, not stating that it is not pleaded to a particular count, would be presumed to be pleaded to the whole declaration. But as it would not be an answer to the 2nd and third counts, but would be to the first, the Court will treat it as an informal plea to that count to which it is alone applicable. *1 Chitty's Arch. Pr.*, 293; *Bonsefild v. Edge*, 1 Ex., 89; *1 Waterman on Tresp.*, 603-4.

If the plea professes to answer only part of the declaration, the plaintiffs' remedy is to mark default for the part not answered instead of demurring; *B. & L.*, 436. But when the plea professes to answer the whole declaration, and does not, the proper course is to demur.

As to the sixth plea demurred to, being the same as that in *Evans v. Ross*, the Court have already decided it in favor of the defendant by a judgment delivered the present Term in that cause.

Weatherbe, in reply.—With reference to the suggestion that this is a mere question of costs, explains that the plaintiffs, in consequence of the jury having given them damages in the other case, of replevin, which may affect their verdict, may have to settle the questions in controversy by this instead of by the other case, unless they can remit the damages. Cites *4 Foster & Finlayson*, 440, as to the duty of Judge to put to the jury the several issues raised by the pleadings on the record, without considering whether the pleas are bad or not. Under the statutable replication the Judge at the trial of this cause would say plaintiffs had joined issue on the third plea, and an immaterial issue would be found for defendant. With regard to the demurrer to the sixth plea it is unnecessary to repeat the arguments used in the other case; plaintiffs, of course, contend that Her Majesty can take no mortgage but by enrolment. Cites *Atty. General v. Sewal*, 3 M. & W., 88. The agreement between the Government and Evans set out that Evans *should not have possession* of any of the property

mortgaged, not that the Government should take possession at any time. Defendant, after allowing plaintiffs possession, should not have taken possession without legal proceedings.

SMITH, J., now, (Dec. 13th, 1876,) read the judgment of the Court, prepared by McCULLY, J. :—

This is an action of tort, the writ of summons in which was issued the 3rd Oct., 1874. It contains three counts. The first charges that on the 2nd June, 1874, defendant with men, &c., forcibly and unlawfully seized and took plaintiffs' steam dredge, which they owned and possessed, their scows, tools and articles on board, and forced possession from plaintiffs, &c., and struck and beat Wallace, one of the plaintiffs, and afterwards illegally sold and disposed of said steam dredge and one of said scows, and the tools, &c., at public auction, and then special damage is described as arising out of the seizure, &c., and claimed, plaintiffs' credit injured, &c., &c.

A second count sets forth the seizure of a certain dredge, five scows and tools, and follows the first substantially, leaving the assault out.

A third count, in trover perhaps, charges defendant with seizing and taking plaintiffs' goods, a steam dredge, scows and implements on board, &c., and carrying them away and disposing of them to his own use.

To this writ defendant pleads ten pleas in all. His 1st, 2nd, 3rd, 4th, 5th and 6th pleas are to plaintiffs' three counts, first alleging in each, that the trespasses, &c., are for one and the same cause of action, and then his first plea denies plaintiffs' ownership of the steam dredge, scows, tools, &c., as alleged.

The second plea, prefaced as the first, denies the force and unlawful seizure, negatives the assault on Wallace, and denies the charges.

The third plea, averring as in the others, denies that the selling and disposal of the dredge and one of the scows and the tools was illegal.

The fourth plea, averring as do all the first six, denies plaintiffs' possession of the goods. The fifth denies property in plaintiffs of the goods described; and the sixth plea, averring

as all the previous ones do, proceeds to justify the acts complained of as therein set forth, that is to say, because Thomas Evans, one of the plaintiffs, contracted with Her Majesty the Queen, represented on that behalf by Hector L. Langevin, Her Minister of Public Works, etc., to do certain work described at Mabou, Cape Breton, in which contract Wallace, the co-plaintiff, it is alleged, was interested, and in and by which contract Her Majesty might make advances on any materials, implements, vessels or tools used or intended to be used, &c., and thereupon and thenceforward such materials, &c., should vest in Her Majesty; that \$20,000 were advanced to Evans under an agreement for a mortgage, payable in one year, &c., which mortgage bearing date 25th May, 1872, by and with the consent of Wallace, Evans executed, and thereby mortgaged the several articles described in plaintiffs' writ, and having failed to redeem, Her Majesty, represented by defendant as her servant, took possession of the said dredging machine and equipments, etc., and sold the same, and "*which are the grievances mentioned in plaintiffs' writ.*"

Under an order for leave to plead and demur to this sixth plea, plaintiffs demur, and their first cause is that the same is pleaded as a special justification without confessing, as it should, the cause of action. What this allegation in this connection means I am entirely at a loss to understand. For defendant explicitly confesses the cause of action, that is, the seizure and taking of the articles described in plaintiffs writ. This is his language: "that he as the servant of Her said Majesty, under and by virtue of Her authority and command and instructions, seized and took possession of the said dredging machine and equipments and scows, tools and other articles on board thereof and belonging thereto, and sold the same at public auction for the purpose of paying Her said Majesty the amount due as aforesaid," *which are the alleged grievances mentioned in the plaintiffs' writ.* Nothing is wanting here. The *quae sunt eadem* clause at the close fixes the application of the plea and completes an issue in fact properly tendered.

The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th causes of demurrer, all to the 6th plea, have been

recently adjudicated upon and settled in the judgment delivered by His Lordship the Chief Justice in the action of replevin brought by the same plaintiffs against the same defendant, in which a verdict passed for plaintiffs, and has been set aside and a new trial granted. This Court then held and now holds, that Her Majesty might well take and receive such a mortgage as is set out in defendant's sixth plea, and through her officers might and may take the articles therein described into her possession without office found, as any of her subjects might, and dispose of the same accordingly, and therefore this Court find no cause of demurrer, general or special, to said sixth plea, and judgment must consequently be for the defendant.

Then follows a second demurrer to defendants third plea, and it is therein stated that "said third plea is pleaded to the third count of plaintiffs' declaration." But this is a mistake. It is not so pleaded. It is pleaded exactly as the first and second pleas are pleaded to the *first, second and third counts*. There are but three counts in the declaration. All plaintiffs' causes of demurrer to this third plea proceed upon the assumption that it is to the *third count of the declaration*, whereas it is not, as on reference may be seen. Consequently the demurrer falls to the ground and judgment must be for defendant.

So far as the meritorious features of this controversy are concerned, they are adjudicated upon and disposed of by the judgment of the Court delivered after argument in a case of replevin tried between the same parties, wherein a verdict for plaintiffs has been set aside, and the points sought to be raised by plaintiffs' replications pronounced untenable. A practice has lately been creeping into this Court that, in my mind, requires to be well considered, and that is, the continuous and repeated applications for leave to plead and demur. These demurrers for the most part decide nothing. They delay the causes sometimes, as the Dockets of Arguments are heavy and full of cases, and suitors are greatly prejudiced in consequence. Unless a demurrer is likely to touch and settle the merits, whether it be to the writ or to the pleas, what use is there in taking up the time of the Court with it? By Sec. 121 of the

Practice Act, the Court is *commanded*—the language is—“*the Court shall proceed, and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form, and no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect in, or lack of form.*” Here end all special demurrers, and all attempts to revive them must and ought to fail.

The Court is with the defendant in this case so far as the pleadings are concerned, and there must be judgment on both the demurrers.

THORPE v. McLEAN.

Plaintiff, having recovered judgment against his debtor, placed an execution in the Sheriff's hands, with instructions endorsed, to levy on the goods of the debtor, and for want thereof to take his body. The Sheriff returned “no goods,” but did not take the body. The residence of the judgment debtor was within the bailiwick, and there was nothing to shew whether he was or was not actually in the bailiwick while the execution was in the Sheriff's hands.

Held, that the plaintiff's verdict in an action against the Sheriff, taken by consent for nominal damages, must stand.

WILKINS, J., dissenting.

This was an action against the Sheriff of the County of Cumberland, to recover damages for alleged non-performance of his duty under a writ of execution at the suit of the plaintiff against one Ells, and the instructions thereon endorsed. The cause was tried at Kentville, when a verdict was taken for plaintiff by consent, damages one dollar, subject to the opinion of the Court upon points raised at the trial. The rule *nisi* to set the verdict aside was argued during the December Term, 1875-6.

Weatherbe, in support of rule.—In the first place there was no record in the cause in which the execution was issued. (RITCHIE, Eq. J. The execution is what binds the Sheriff.)

Then the plaintiff should have proved that the party against whom the execution was issued was within the Sheriff's precincts, within the time during which the execution was in force, and that the Sheriff had notice. Again, the Sheriff is not liable for the neglect of his deputy. Cites *Chitty's Arch. Q. B. Pr.*, 19 and 631; *L. R.*, 4 Q.B., 576; *Bullen & Leake*, 400.

Rigby, Q. C., contra.—The only point of importance raised on the opposite side is as to want of proof of Ells being within the Sheriff's precincts. The Sheriff himself proves by his letter put in evidence that Ells resides in the County of Cumberland. (RITCHIE, E. J., WILKINS and SMITH, J. J. This seems to be a hard case; the Sheriff has written to the plaintiff saying that if he had arrested the defendant he would have taken advantage of the Act and sworn out. The Sheriff acted for the advantage of plaintiff.) The plaintiff has consented to take merely nominal damages. (RITCHIE, Eq. J., and WILKINS, J. That is an admission that he had only a right to nominal damages; you [Mr. Rigby] would not have brought such an action.) Cites *Bullen & Leake*, 396; *Clifton v. Hooper*, 6 Q. B., 471.

Weatherbe, in reply.—The only evidence as to Ells being in the precincts, the Sheriff's letter, contains only hearsay evidence upon that point, what his deputy told him. The Sheriff according to the form of our executions and the instructions endorsed on this particular one, has a certain discretion. In England, under a *ca. sa.*, the Sheriff is directed absolutely to take the body. Here he is to satisfy himself that defendant has no goods. If he arrested, and defendant had a dollar's worth of goods, plaintiff's attorney might sue him for arresting.

MCDONALD, J., now, (December 13th, 1876;) delivered the judgment of the Court:—

The plaintiff obtained a judgment in the Supreme Court against one Ells for \$37.69, and placed an execution in the hands of the defendant, Sheriff of the County of Cumberland, with instructions to levy on the goods of Ells, and for want thereof to take his body. The Sheriff returned that Ells had

no property whereon to levy, but he did not take the body and this action is brought to recover damages for the defendant's alleged non-performance of his duty in that respect.

There is nothing to shew that the return is false, but the contrary, and the evidence does not shew that the execution debtor could not have been taken. The learned Judge who tried the cause recommended a verdict for nominal damages, subject to the opinion of the Court, whether the verdict should not be entered in favor of the defendant, which was agreed to.

There is no doubt that the plaintiff was entitled to have the body of Ells taken, and no justification appears for the Sheriff's neglecting his duty in that respect. *Clifton v. Hooper et al.*, 6 Q. B., 468, shows that, where a party's right is invaded in consequence of another's breach of duty, he is entitled to recover in an action, but that in a case like this the measure of damages is not necessarily the whole debt, but such a sum as the jury may think equivalent to the real loss. The evidence in this case would not justify more than nominal damages, as it does not appear that, if Ells were arrested, the plaintiff could have recovered any part of his debt.

Barker v. Green, 2 Bing., 317, and *Bales v. Wingfield*, 2 Nev. & M., 831, are also authorities on that point. The evidence shews that the residence of Ells was within the Sheriff's bailiwick, and the presumption is that he was at his residence. The Sheriff did not return that he was not within his bailiwick, and his letters did not deny that fact, but simply alleged that he was not worth anything. No such objection was taken at the trial, so that the learned Judge could have left that as a question of fact to the jury. I have not the slightest doubt that he was at home, though I would have preferred to come to a different conclusion; neither have I any doubt that it was understood at the trial that he was at home, otherwise the objection would have been taken. I think the plaintiff is entitled to retain his verdict.

RITCHIE, E. J., said he entirely concurred in the law as stated by the learned Judge who had delivered the judgment of the Court, but he considered that the action should never have been brought. The usual instructions to levy on the

personal property of the debtor and in default to take the body, so usual as to be frequently in print, were indorsed on the execution, but no special directions were given to the Sheriff, who was quite prepared to take the body, but had acted in the interest of the plaintiff in not doing so, as it had been shown that the debtor was an absolute pauper, whose arrest the plaintiff subsequently declined to authorize.

DESBARRES, J., said he felt obliged to concur in the judgment. It was an exceedingly hard case. The Sheriff had received the usual instructions to levy on the goods, and for want of them to take the body. There were no goods to take, but his (DesBarres, J.'s) only difficulty was that the body was there in the bailiwick, and that part of the instructions the Sheriff had failed to comply with. He assented with a great deal of reluctance.

WILKINS, J., read the following dissentient opinion :—

Action against defendant, as Sheriff of Cumberland, for not taking the body of one Ells under a writ of execution issued under a judgment obtained by the plaintiff against Ells, which was delivered to the defendant to be executed. The writ of summons, in the usual and necessary form, contains an averment that Ells at the time of the delivery of the writ and afterwards during a reasonable time was within defendant's bailiwick, and that defendant had notice of that fact. To this material allegation defendant pleaded, "that Ells was not within the precincts of defendant, nor had defendant notice of his being so." That traverse imposed on plaintiff a necessity of proving the matter so alleged, and if he has not done so he cannot sustain his verdict. The rule of law is clear, and as an illustration of it, see *Clifton v. Hooper et al.*, 6 Q. B., 468. Indorsed on the execution was a direction, not different in substance and effect from the mandate expressed in the body of the writ. Had it been, "take the body, if defendant don't shew goods to satisfy," then it would have been reasonably indicated by plaintiff to the Sheriff, that the former *desired the body to be taken*, if goods were not forthcoming, but it is quite obvious, that, if a Sheriff, not otherwise directed than the

writ directs him, were without special instructions to take the body without first returning "*nulla bona*," (and this defendant did make such return,) his conduct in that respect in nine cases out of ten would be complained of by the judgment creditor. In this view it will be to me very satisfactory, if, consistently, with law, this verdict can be set aside. And I am of opinion that, under the pleadings, the evidence, and the verdict as taken, it cannot be maintained. Of course if defendant, such as Sheriff, has been, as such, guilty of a breach or neglect of duty, he is liable to nominal damages at least. A verdict for nominal damages, suggested by the learned Judge at the trial, was assented to, subject to the opinion of the Court whether the verdict should not be entered for the defendant. No power is given to the Court to draw inferences, as a jury might, from facts proved, and therefore referring to the issue above stated we are to enquire if there be sufficient *positive* proof that Ells was, after delivery of the writ to the defendant, within the bailiwick of the latter, and that he might have been arrested. I think there is not such proof in the case, and that therefore the affirmative of that issue has not been established. The defendant said, "I had seen Ells and made enquiry besides." To what time that refers is left a matter of perfect uncertainty. Defendant further said, "Defendant (meaning Ells) lived seventy-five miles from Amherst. I had a deputy there." There is no proof that even the deputy, after delivery of the writ to defendant, saw or knew of Ells being at his residence. It might be very doubtfully inferred—perhaps; it is not proved. The defendant on his re-examination, said, "I did not see Ells personally before I returned the execution."

This is the sole evidence on which the verdict under the issue referred to rests. It is to my mind clearly insufficient and it is worthy of consideration, that, if Ells had been, within the period of time in question, within defendant's bailiwick and capable of being arrested, no possible difficulty of proving the fact could have existed.

The exhibits in proof, being the two letters of the 2nd of March and the 6th of October, 1874, addressed by the defen-

dant to the plaintiff's attorney, while they shew perfect good faith and honesty of purpose on the part of the defendant, add nothing to the proof of the issue already noticed.

I am of opinion that the verdict should be set aside. and judgment be entered for the defendant.

O'NEIL v. WELLS.

Plaintiff testified that defendant "entered" his premises, "as a yearly tenant, at \$20 a year;" and that "there never was any agreement that he was to be a monthly tenant." Defendant testified that "the premises were engaged verbally at \$20 a month." Defendant also put in evidence two receipted accounts from plaintiff, one for "one month's rent of office, from 1st Nov. to 1st Dec., 1871, \$20," and another for four and a quarter months' rent.

Held, that the evidence so largely preponderated in favor of defendant, in the absence of explanations by the plaintiff of these accounts, that the verdict in favor of the plaintiff must be set aside.

RITCHIE, B. J., and WILKINS, J., dissenting.

This cause was argued during the December Term, 1875-6, by *Tremaine*, in support of rule to set aside verdict for plaintiff, and *McDonald*, Q. C., contra.

SMITH, J., now, (December 13th, 1876,) delivered the judgment of the Court:—

This was an action brought for the use and occupation of a part of the building, in the City of Halifax, known as the "International Hotel," and owned by the plaintiff. He claims a balance of rent alleged to be due from the defendant for a period of six months, *i. e.*, from the first of November, 1873, until the first of May, 1874, at a yearly rent of £90, = \$360. The defendant pleads, *First*, that he never was indebted as alleged; *Secondly*, that he did not use the rooms and parts of a message and offices of the plaintiff as alleged; *Thirdly*, a plea of payment; and *Fourthly*, a general denial to the common counts.

That the defendant occupied the premises until some time in November, 1873, and used them in connection with his business, as Agent of the "Travellers' Insurance Company," a foreign office, and that he then left, ceased to occupy them, and sent the key to the plaintiff, is undisputed.

The defence which the defendant sets up is, first, that he is not individually liable, because he disclosed to the plaintiff at the time he hired the premises, that he was doing so as the agent of the Insurance Company ; secondly, that the hiring was not a yearly one, but was monthly, at the rate of \$30 per month.

Let us first consider the law with reference to the personal liability of an agent. An agent is not liable personally unless he transcends his agency, or departs from its provisions, or unless he expressly pledges his own liability, in which case he is liable, although he describes himself as agent, or unless he conceals his character as agent, or unless he so conducts as to render his principal inaccessible or irresponsible, or unless he acts in bad faith ; 1 *Parsons on Contracts*, (5 Ed.,) 64. This is undoubtedly the law as governing the liability of persons contracting in the capacity of agents. To this, however, an exception has been recognized, the precise extent of which has not been clearly settled and understood. There are numerous cases in which the point has been discussed and decisions come to, governed by the peculiar facts and circumstances of each case. I refer to the liability of agents or factors acting for persons residing in a foreign country. From a careful perusal of the different decisions on the subject, it does not appear to have been settled that an agent is necessarily and absolutely liable, and the foreign principal exonerated in every case. It would seem rather to resolve itself, as in all matters of contract, into a question of *intention*. In *Dicey on Parties to Actions*, 271, the principle is thus perspicuously defined : "It is possible that a third party with whom an agent contracts, as an agent on behalf of a known principal, may be willing to give credit to A, the agent, and not be willing to give it to P, the principal. The party so dealing with the agent cannot afterwards sue the principal. Thus, where T. sells goods to A. for the use of P., who is known to be A.'s principal, but gives credit exclusively to A., he cannot, after having treated A. throughout as the party with whom he contracts, treat P. as the party liable." And this is recognized as law in *Addison v. Gandasegui*, 2 Smith's L. Cases, (6

Ed.,) 313. And again, this author (Dicey) says, on the same page : " Where an agent in England buys for a foreigner resident abroad, the agent is generally to be considered as pledging " his own credit, because it is highly improbable that the seller " would have given credit to a foreigner. But the question, to " whom credit was given, is, in all cases, one of *intention*, to be " answered either from the contract, or, where that is doubtful, " from the facts." It was so held in *Thomson v. Davenport*, 2 Smith's L. C., 327. In *Mahony v. Kekule*, 14 C. B., 390, JERVIS, C. J., while recognizing the law as thus laid down, says : " The question, no doubt, is one of intention, to be collected from the contract," and adds, " If that be left in " doubt, the circumstance of it being a foreign contract may " be looked at." In the case of *Hardy v. Fairbanks*, decided in this Court in 1847, and in which a most able and exhaustive judgment was given by the late Mr. Justice BLISS, it was held that *presumptively* a foreign principal was entitled to sue and be sued upon contracts made by his agent here, although the name of the principal was not disclosed by the agent at the time of making the contract. In an extended note on page 874 in the 2nd vol. of Kent's Com., this decision is remarked upon. In *1 Parsons on Cont.*, 63, it is stated, " Where the name " of the principal is disclosed at the time the contract is made " with the agent, the former is the proper party to sue upon " the contract. This is so whether he be the citizen of another " state or not." This doctrine is contrary to the rule laid down in *Story on Agency*, as to contracts made for residents in a foreign state, and which was supposed to be the doctrine of the English cases at the time. But the doctrine has more recently been explained by the English Courts, and Judge Story's rule rejected. The doctrine never was generally received in this country, and in a recent case in the Supreme Court of the United States it was directly disavowed.

The contract on which the plaintiff seeks to recover in the case before us, was not in writing, and therefore in view of the authorities and the law I have referred to, we can arrive at the nature of the contract and the intention of the parties to it by the light of the evidence adduced at the trial alone.

It cannot but occur to any one who reads the minutes of evidence that the testimony of the plaintiff is meagre in the extreme, upon a point so essential as a part of his case as to the question, upon whose credit the property was let. There is nothing to shew any distinct pledge or assumption of personal liability on the part of the defendant. It is true the plaintiff says, "I rented the premises to the defendant solely," but that is all. In contrast with this we find the statement of the defendant in his deposition, which I think was properly admitted; "I did not use the premises mentioned in the writ for myself, nor did I hire them for myself. The premises were hired for the 'Travellers Insurance Company,' of which I was agent. I was then sole agent." In corroboration of this, the plaintiff himself proves that the defendant, when hiring the property, said it was for the Travellers Insurance Company, and we find two accounts and receipts, given by the plaintiff to the defendant for the rent paid, headed:

"Travellers Insurance Company,

"To B. O'NEIL, Dr."

I cannot avoid being impressed with the fact that the weight of the evidence is against the plaintiff as to an exclusive credit having been given to the defendant when the premises were let. Yet after the finding of the Jury I should be disinclined to disturb the verdict, if this were the only ground of objection to it. It will be unnecessary, however, from the view I take of the case, to express a decided opinion on this point.

It was contended at the argument by the defendant's counsel that, admitting the defendant to have been a yearly tenant by use and occupation would not lie for the recovery of the rent accruing due for the period during which he did not occupy the premises, although the term existed. I cannot admit this to be sound law. I can find no authority to sustain such a position. I concede that until an entry into the premises is made no such action could be maintained. When an entry is made, and the term remains legally unsurrendered, rent may be recovered without a continued actual occupation in this form of action. In a note in 5 Exch. to the case *Lox v. Ross*, 555, it is said: "In *Wood v. Wilcox*, 2 Denio, 37,

" was determined that under the Statute, 11 Geo. 2, c. 29, and " under a Statute of New York, similar to it, there could be " no recovery for use and occupation, unless there has been an " entry into the demised premises by the defendant in person " or by his agent, or under tenant, though it is not necessary " that the actual occupancy should continue during the whole " period for which the action is brought." In *Smith v Twoart*, 2 M. & G., 841, it was held sufficient evidence of occupation to go to a jury, that a woman was sent to clean the house, and a workman to paper one of the rooms, and use and occupation was maintained. *Atkins v. Humphrey et al.*, 2 C., B., 654, is also an authority to this effect.

It is beyond all doubt necessary, although this be the law that the plaintiff should have made out such a case establishing a yearly, and not a monthly tenancy, as would justify the finding of the jury. A recent decision of the Privy Council, well known doubtless to the profession, requires the Court to see that the verdict of a jury does not run counter to a large preponderance of the evidence. Now what is the testimony in this case? The plaintiff and the defendant are in direct contradiction to each other in their statements as to the nature of the tenancy. The plaintiff says; "He entered as a yearly tenant at £90 a year;" and again; "There never was any agreement that he "was to be a monthly tenant." The defendant states; "The premises were engaged verbally at \$30 per month. No "time for which they were to be taken was stated; the rent "was paid just as plaintiff required money—sometimes by "the month; and sometimes it ran five months before he came "for it. I have receipts paid for rent at different times." If there were no further testimony in the case, it would have been purely for the jury to decide as to the correctness of these conflicting statements; but when we regard the written, and therefore more solemn and reliable, testimony, furnished under the hand of the plaintiff himself, corroborative of that given by defendant, it presents to my mind an almost insurmountable difficulty in plaintiff's way. It is true that receipts are not conclusive, but I take them to be so until

explained, and their unambiguous admissions removed by direct testimony. What is the object of requiring such written acknowledgments, if not to bind the signer of them by their contents and language? If mere suppositions and conjectures are to render them valueless and inoperative, then the importance and significance given to them in the commercial world, and by the legislatures of every country, would be devoid of force and reason.

I cannot lightly disregard the written admissions and statements of a party to a suit. I cannot but think that it would be both unwise and dangerous to do so. It is somewhat singular also that the plaintiff offered no explanation accounting for the manner in which the accounts in evidence were made out. If he desired to alter their obvious import it was *his* duty when under oath to do so. Is it not to be presumed that he could not? I think such an inference from his silence is perfectly legitimate, if not inevitable. He asserts that a yearly tenancy was agreed upon between defendant and himself, and yet he renders one account:

"To one mos. rent of office from 1st Nov. to 1st Dec.,
1871.....\$30."

What does this mean? I regard it as meaning just what it says in effect, if the English language means anything, viz: *I have a right to call upon you (defendant) for one month's rent of the premises you hold of me under our agreement at \$30 per month.* This bill is paid and he receipts it. Another bill is rendered by him in which he charges four and a quarter months rent of office at \$30 per month, \$127.25. He receives this amount also and receipts the bill. The evidence so largely preponderates in my judgment in favor of defendant, in the absence of any explanation of these accounts and receipts which might or might not do away with their palpable meaning, that I cannot consider the evidence sufficient to justify a jury in regarding the hiring of the premises by the defendant as a yearly one, without which he cannot recover. I think there should be a new trial to enable, if possible, the plaintiff to explain these accounts. The rule must be made absolute, the costs to abide the event.

DESBARRES, J., said there were two questions to be considered, first, whether the premises were let to the defendant or to the company of which he was agent; and, secondly, whether the premises were taken by the year or by the month. The plaintiff's testimony was diametrically opposed to that of defendant. That part of the evidence which under these circumstances affected his (Mr. Justice DESBARRES') mind consisted of the two receipts produced by the defendant, one for one month's rent, and the other for four months and a quarter's rent. These receipts, he thought, ought to have been explained by the plaintiff, if he had any explanation to give. No explanation was given, and he (Mr. Justice DESBARRES) came to the conclusion therefore that the tenancy was a monthly tenancy, and that the plaintiff had no right of action, as the whole amount due for the time of occupancy had been paid. He thought therefore that the cause should go to another jury, concurring as he did in the views expressed by his learned brother, Mr. Justice SMITH.

WILKINS, J., said he was sorry to say that he could not agree with his learned brethren. He then read the following dissentient opinion:—

The jury were instructed distinctly, that, if they were of opinion that the hiring was monthly, not yearly, defendant ought to have a verdict. Suppose they reasoned thus: "We have faith in the character of plaintiff, and, when he swore that 'defendant entered as a yearly tenant, at £90 a year,' and that '*there never was any agreement that he was to be a monthly tenant*,' we believe him." Suppose, as respects the effects of the receipts No. 1 and No. 2, having on their faces a somewhat contrary aspect, the jury thought it was for defendant's counsel after having heard plaintiff's positive evidence referred to, by cross-examination of plaintiff on the point, to have cleared that matter up, and explained the papers, and he not having done so, nor seemingly interrogated him at all on the point, concluded that the *monthly* payments shewn by the papers were so made as a mere matter of financial convenience, and not as at variance, necessarily, with the plain-

tiff's general statement of the contract. Suppose in view of the receipts, and the proved written notice, they reasoned thus: there are difficulties as to crediting defendant's statement of the contract arising out of the three written papers, thus, viz.: No. 1, indeed, consists with defendant's version, for it is a claim for a precise month, between 1st November and 1st December; but No. 2 does not consist with it, for it is a claim for a four months *and a quarter of a month's rent*, for which quarter plaintiff could have had no claim on defendant's own shewing. Payment for that period well consists, however, with the *convenience* hypothesis.

Suppose, looking at No. 3, a notice written by defendant himself, they observed that it notified plaintiff of defendant's intention to quit, not on the *first* of November, when, as No. 1 shewed, a current month would end, but on the 24th of November, and noticed, moreover, (what is very striking,) that the period of indebtedness in No. 2 is computed, not from the last day of a particular month, or from the first of another, but actually from the 23rd or 24th of May then preceding, and suppose the jury did not, in view of this, consider plaintiff's testimony in Court to be contradicted by the writings; I am not prepared to say that their conclusion is wrong. I think to say so would be setting up a very dangerous precedent.

Wells' testimony is much weakened by the evidence furnished against himself by receipt No. 2, and notice No. 3.

In the former we have him, who asserted that the tenancy was monthly, and (see No. 1) the month beginning on the first day of the month—we have him, I say, in No. 2, computing a month's rent from the 24th of May, or thereabouts, and making the period of his charge (of $4\frac{1}{4}$ months) end on the 1st of October.

So we have him in the latter, in effect, contradicting himself by a written declaration that the month of the current holding was not from the first but from the 24th day of it. The defendant paid the yearly taxes, an act not consistent with a mere monthly holding. He did not state that he thought he had any ground of appeal, or contemplated appealing, but merely; "I didn't appeal in time, therefore obliged to pay."

That the bills appear on their face *against the Company*, when viewed, in contrast with these words of plaintiff, "*I rented the premises to the defendant solely*," is a fact to which the jury would with good sense have attached no weight whatever. It does not weigh a feather in the scale when considered thus. The defendant does not pretend, (I have examined his evidence with care,) to deny the truth of plaintiff's statement just noticed by me. He doesn't pretend to say he didn't make himself personally liable to plaintiff; he should have said so explicitly if he could. When he said, "I didn't *use* the premises for myself, nor did I *hire* them for myself, they were *hired* for the Company of which I was agent, he used words which are perfectly consistent with plaintiff's positive statement that he "*rented the premises to defendant solely*,"—perfectly consistent also with defendant's having so understood the contract. This is undeniable. Paraphrase the words, and they will read thus: "I didn't use the premises for myself, I didn't hire them for myself, but I understood, and so did plaintiff, that he was to look to me, and I to the Company." If the jury read the transaction thus, they shewed their intelligence in doing so. But, observe, the plaintiff said, "I don't remember, but *it is very probable defendant when hiring the property said it was for the Travellers' Insurance Company*." How natural it was then, that, with this knowledge, plaintiff made out the bills *against the Company*. Suppose an intelligent jury said, "We think he made out the bills against the Company, because he knew the occupation was for the use and benefit of the Company which was ultimately to pay; while all the while he didn't for his rent look to the distant Company, but to the defendant near at hand, and that by virtue of his express arrangement with him. If they so read the transaction rather than say the plaintiff swore false, who could wonder.

I should be extremely sorry to interfere with such a verdict as this, which is the verdict that I should have given as more consistent with the whole evidence than a verdict for defendant would be.

It appears to me impossible to set aside this finding in a

matter so peculiarly within the functions of a jury, when the verdict is sustained by so much evidence. To disturb this finding will not harmonize with the solemn decision of this Court in *Stevens v. Pitts*, the Windsor case, which affected deeply the moral character and reputation of a witness. I am afraid, moreover, that judicially to set aside this verdict will necessarily involve a judicial opinion that the limits of interference of the Court with an exercise by a jury of its peculiar functions, are no longer what they were once understood to be.

RITCHIE, E. J., said he thought the verdict should not be disturbed. The impression conveyed to his mind by the evidence with regard to the question, to whom were the premises let, was this, that if O'Neil had been told by Wells not to look to him, but to parties in Montreal, he would have said, "No, I would have no recourse for my rent." As he (Mr. Justice RITCHIE) viewed the case, it was open to the jury to take that view, that Wells was to be the paymaster. He did not look upon the receipts put in evidence as at all conclusive in the matter, and, viewing the whole case, he could not think that the jury had done wrong in finding as they had done. If he were trying the case over again he should again leave that question to the jury.

MCDONALD, J., thought that, in view of the fact that those receipts remained unexplained, there ought to be a new trial.

DESBARRES, J., thought that, under the circumstances, the costs of the argument as well as of the trial should abide the final event of the cause.



MCDONALD ET AL. v. BRODIE.

Plaintiffs claimed title to a certain lot of hay cut by them under an agreement entered into by them with one McK., dated 18th June, 1867. No evidence was given of McK.'s right to sell the grass or hay other than the presumption arising from his having long been and then being in occupation of the land. Defendant produced an agreement, dated 8th June, 1866, with McK., reciting that McK. and wife had that day conveyed to defendant the land on which the grass grew, and gave evidence of having received a deed of the same bearing the same date, but did not produce any deed, and also gave evidence, uncontradicted, that he was put in possession on the 9th June, 1866, by McK., and that from that time onward McK. was acting as his servant.

Held, that the verdict for plaintiff must be set aside.
WILKINS and SMITH, J. J., dissenting.

This was an action of trover to recover a quantity of hay, alleged to be the property of plaintiff. The suit was tried in 1869, before Mr. Justice DODD, and a verdict found for plaintiff for \$288. This verdict was set aside by the Court, and a new trial granted. The cause was tried a second time in 1874, before Mr. Justice WILKINS, and a verdict found for plaintiff for \$480. A rule *nisi* to set aside the second verdict was argued during the December Term, 1875-76.

W. A. Johnstone, Q. C., in support of rule.—We have deed from Wm. McKenzie and wife to defendant, 8th June, 1866; agreement same date; assignment of McLean's mortgage to defendant, 31st July, 1867; writ of ejectment, *Brodie v. McKenzie*, 1st March, 1867; Habere and Record, 28th October, 1867. On the other hand the agreement for the grass, from W. McKenzie to plaintiffs, is dated 18th June, 1867; hay cut August, 1867; the conversion, if any, March, 1868. Defendant got possession of the land 9th June, 1866. This suit was brought 25th May, 1868.

This verdict must be set aside because it stands in the same position as the verdict in the former trial, which was set aside by the Court. The defendant swears that McKenzie put him into possession on the 9th day of June, 1866, of the land on which the hay was cut, and McKenzie was not put on the stand to contradict him. The answers of the jury to the questions put by the judge as to the possession of McKenzie, and his interest in the hay, were therefore against the evidence. The judgment in the suit of ejectment brought by the defen-

dant against McKenzie, is an estoppel in this case. *Cole on Ejectment*, 635; *Wilkinson v. Kirby*, 15 C. B., 443, 10 A. & E., 763. Again, there is no demand proved here. Plaintiffs have not proved any title to the land or property in the grass.

C. S. Harrington, with whom was *Henry*, contra. There can be no need of demand in this case, after the violent refusal of defendant to allow the hay to be taken from his barn. The fact that there is no specification in the rule in this cause of the ground on which the verdict is sought to be set aside, must prevent the defendant from taking advantage of most of the points he has raised; R. S., 4th Ser., Chap. 94, Sec. 212. The property of plaintiffs in this hay is based upon a valid agreement with McKenzie, whom the defendant had put in possession of both land and hay. The deed from McKenzie to defendant was of the southern part of lot number ten, while the evidence proves that the hay was cut on the northern part of lot number ten. In 1873 the defendant took an assignment from McKenzie of his property, including part of lot number ten, and defendant is estopped from setting up that he had a title to that portion in 1867.

Henry—It is clear that in this case, which has been tried twice, the judges in neither case expressing dissatisfaction with the verdict, the jury has passed upon the credibility of the defendant, and that adversely. The deed from McKenzie to Brodie conveys the southern part of lot No. 10, while the grass was cut on the northern part.

W. A. Johnstone, Q. C., in reply—Announces his intention of proving, from the minutes of other trials between these parties, certain points contradictory of what is now urged as to the *locus* on which the grass was cut. (*RITCHIE, Eq. J.*; You can make no such use of minutes of other trials. The Court is confined to the minutes in this trial.) McKenzie cannot come in now and say he did not convey the *locus* to Brodie, because he has conveyed to him under seal all his land at Little River. There is no evidence to support the finding of the jury on that ground taken now by the other side. The defendant and another witness swear posi-

tively that the grass was cut on the land conveyed by McKenzie to defendant, and there is nothing in plaintiff's evidence directly contradictory to that. There is no proof of demand here. (RITCHIE, Eq. J.—Could there be a more distinct demand and a more distinct refusal than here, where plaintiffs went to get their hay, and defendant said he would rather burn the barn than that they should get a spear of it.) Cites *Burton's N. B. Rep.*, 133; *Cole on Ejectment*, 346 and 366; *3 Bingham* 11; *Thoroughgood v. Robinson*, 6 Q. B., 639; *Wylde v. Waters*, 16 C. B., 637. There is no proof of the conversion of the whole of the hay by defendant, nothing to prove that some of the hay had not been taken by some one else.

RITCHIE, E. J., now (December 13th, 1876,) delivered the judgment of the Court:—

The plaintiffs claim title to the hay which is the subject of the suit under an agreement entered into between them and one William McKenzie, whereby he conveyed to them all the grass, hay, and clover growing or to grow during the ensuing and following summer, in and upon a certain tract of land at Middle River, therein described, with power to enter upon and to take them away. This agreement is dated 18th June, 1867. McKenzie was then in occupation of the land, and had been so for a long period before. The plaintiffs cut the hay, about twenty tons, and stored it in a barn on the premises, also occupied by McKenzie, but not on the part described in the agreement with plaintiffs. The plaintiffs were prevented by the defendant from taking the hay, as he claimed it and retained it as his property.

This is the plaintiff's case. McKenzie is not produced, and no evidence is adduced of McKenzie's being the owner or having a right to sell the grass, &c., other than the presumption arising from his being in the occupation of the land.

On the part of the defendant an agreement was produced dated the 8th June, 1866, entered into between McKenzie and him in these words: "Whereas Wm. McKenzie and Margaret his wife have this day conveyed unto the Reverend Neil Brodie, all their right and title in and to the lot of land occu-

pied by them at Middle River for the consideration of \$1280, and as there are several incumbrances existing against the property it is agreed by and between the said parties that the said purchase money be deposited with Charles J. Campbell, Esquire, to be held by him until the said property be freed from all incumbrances." It is in evidence that the defendant received a deed which embraced the same property bearing date the same day, but that deed was lost, and no sufficient proof of search was given to justify the reception of a copy, and on the following day, the 9th June, he received possession of all the lands McKenzie then occupied at Middle River. The evidence of the defendant is that McKenzie was acting as his servant from June, 1866, under an agreement he made with him and his family, and that McDonald, the plaintiff, knew of it. On his cross-examination he said McKenzie put him in possession on the 9th June, 1866, under the deed; he was his servant then; John McLennan was present when the agreement was executed between the defendant and McKenzie, and McLennan confirmed the defendant's statement generally, and said that McKenzie was the servant of defendant, receiving wages, and having the privilege of keeping some cows on defendant's land.

This evidence is entirely uncontradicted; the verbal testimony is in unison with the agreement produced, and there is nothing in the surrounding circumstances to throw a shade of suspicion on its truthfulness, nor is it all inconsistent with the plaintiff's testimony.

Assuming, and I think we are not at liberty to do otherwise, that the defendant was put in possession of the property in question under the agreement, McKenzie had no right to convey it to the plaintiffs, so that the defendant was well justified in refusing to allow them to take it away. The verdict therefore should have been for the defendant.

We have not the charge of the learned Judge who tried the cause, but two questions were put to the jury; to the first they answered that on the 18th June, 1867, Wm. McKenzie was in possession of the land on which the grass was cut, having an interest then in the grass; to the second, that the

plaintiffs did not know that McKenzie was not interested in the grass, and had no reasonable grounds for supposing that he was not really entitled to the grass. These, it appears to me, were not the questions on which the case turned; the simple question involved was, whether at the time of the agreement made between the plaintiffs and McKenzie, the latter had a legal right or authority to sell it; if he had not, the plaintiffs could acquire no title to it. Under the evidence, as I view it, he then neither owned it, nor had he any right to sell it; and I therefore think that the verdict for the plaintiffs should be set aside.

DESBARRES, J., concurred.

WILKINS, J., read the following dissentient opinion, stating, before doing so, that he had not previously heard the opinion just read by the learned Judge in Equity :—

As the minds of human beings are constituted, varying inferences will often be drawn by them from the same state of facts, but, when a difference of opinion unhappily exists, as must often be the case, on a judicial bench, it is an unfortunate state of things if, respecting the *evidence* which constitutes the subject of inquiry and of judgment, the differing minds are not in harmony. I was the Judge who tried this cause. The way in which I put the case to the jury does not commend itself to my learned brethren on the expressed ground, *that the defendant shewed title*—a fact, if it be a fact, which was certainly ignored by the presiding Judge, whose direction, on the assumption of the fact, was wrong. Respecting this, I have no alternative left me, according to my convictions, but to assert, as I do assert, with the greatest possible respect, but in the most unqualified terms, that not only did the evidence, the documents *included*, fail to shew title to the *locus* in the defendant, but *that* evidence, viewed in connexion with statements made by the plaintiffs, whom the jury believed, statements which the defendant heard, but did not contradict, shewed conclusively that the defendant had no title. This I assert now—I shall shew it presently. This was an action of trover for conversion of a quantity of hay. The pleas denied

the alleged conversion as well as property in the plaintiffs, asserting the property to have been in the defendant. The cause was tried at Baddeck before WILKINS, J., who submitted to the jury the following questions, which were thus answered (Here the questions and answers were read.) The McKenzie mentioned in the questions was he under whom both parties claimed a right to the possession of the locus on which the grass that made the hay in question was cut, and both questions were necessitated by the evidence as well as by the issue.

In regard to the first question, *it was the only question that could be put in order to determine the one only issue.* It was, therefore, of the essence of the matter in controversy. What was the question involved in the issue raised by the third plea? That there may be no possible misapprehension I will read the plea. It is in these words: "The defendant says that the said goods were not, nor was any of them, the plaintiffs' as alleged, but were the goods of the said defendant." There was no other plea except denial of conversion which was not in controversy. Thus the inquiry necessitated was, "Whether the hay (which was only potentially such, at the time specified in the question) was the property of the plaintiffs or of the defendant." That absolutely depended on the very question put, that is to say, one that would determine whose the standing grass was on the 18th day of June 1867, on which day one McKenzie by his written agreement with plaintiffs under his seal transferred, or professed to transfer, the standing grass to them. On that the plaintiffs rested their asserted right to cut the grass and to make it into the hay in question. It gave them the grass growing and growing during a specified period on land described in the agreement. To shew that the standing grass was then McKenzie's grass, the plaintiffs adduced no documentary title whatever McKenzie, but relied on his then and long previous possession of the land. To meet this, the defendant asserted his possession of that land at that time. He produced no documentary title that shewed the land to be then his. The only document he did produce, as will appear when I notice them, absolute

disproved his title to it. The sole question of fact, therefore, was, who had possession at date of the agreement? In this state of the evidence, more particularly to be noticed hereafter, the presiding judge, presumably having read the issue that lay before him and presumably not unmindful of the elementary maxim of real estate law, to the effect that possession of land is *prima facie* title to land and to all that grows upon it, and presumably bearing in mind the fact that both parties claimed the hay under *McKenzie*, submitted this question to the jury: "On the 18th of June, 1867, was *McKenzie* in possession of the land on which the grass was cut, having an interest *then* in the grass?" Bear in mind defendant swore *McKenzie* was not *then* in possession, but *he* was. Now, nobody can have a more profound respect than I have for the learned judge who tried this cause, but, were it not for the human fallibility which attaches to him in virtue of his descent from the common progenitor of us all, I could not conceive it possible that he *could* have erred in framing a plain question on so plain an issue. If he had not put it as he did put it, (I hope the learned judge will excuse me for saying it) he would have failed to ascertain from the jury their sense of the one only subject for their inquiry. To the question as put the jury might have answered (and surely this is very suggestive), "*McKenzie* was not, then, in possession, having the interest *but defendant was.*" Had they so answered, the defendant would have got a verdict. In that case, I think it probable we should have heard of no objection to the form or to the substance of the question. But, as already observed, they found otherwise. What necessitated the subordinate question 2 will be explained presently.

The answer to the question just considered is entirely supported by testimony given on behalf of the plaintiffs, which the jury, having not only answered the questions in their favour, but found a general verdict for them, must be taken to have believed. The plaintiffs claimed the standing grass under the written agreement. For the plaintiffs it was proved that *McKenzie* was in possession of the land at the time of the agreement, and had been in such possession for forty years;

that the grass was cut within the limits defined in that agreement, and *on the northern part* of lot No. 10 ; as these words are of the greatest importance in the case, I extract from the minutes the testimony of John McDonald, one of the plaintiffs, who uttered them. He swore, and was contradicted by nobody,—“The hay was cut on the *north part* of lot No. 10.” It was further proved that the hay was deposited in McKenzie’s barn ; that on the 10th March, 1868, it was converted by the defendant. Thus was the plaintiffs’ case fully sustained by the testimony that they gave. It is true that it was not left uncontradicted, and that the defendant’s testimony, if believed, shewed that his was the possession, when the grass was cut and at the date of the agreement.

On that point, the witnesses on the one side contradicted the witnesses on the other side. And the jury decided on the point of credibility in favor of the plaintiffs. The defendant gave in evidence a written agreement between McKenzie and him dated the 8th June, 1866, in these words : “Whereas William McKenzie and his wife have this day conveyed unto the Rev. Neil Brodie, all their right and title in and to the lot of land occupied by them at Middle River, for the consideration of \$1280, and as there are several incumbrances existing against the said property, it is agreed by and between the said parties that the said purchase money be deposited in the hands of Charles Campbell, Esq., to be held by him until the said property be freed from all incumbrances. Dated at Baddeck, the 8th day of June, 1866.” This is signed by the parties to it. I certainly will not trifle with the intelligence of those who hear me by inquiring whether this parol paper, reciting that McKenzie *had conveyed*, but without even showing how he had conveyed, could amount to evidence of title in defendant (even if it referred to the *locus* in question) and to title too under McKenzie to countervail the title of plaintiffs to the grass conferred on them by McKenzie by his written agreement under seal produced and proved in Court. I will remark, however, in passing, that, if McKenzie had conveyed by a document, this paper shews it was a mere escrow until the condition of paying the purchase money named was performed.

The only other document given in evidence by the defendant *that existed before the action was commenced*, except the mortgage executed by McKenzie and wife to the plaintiff, McLean, which McLean swore had been paid off, and *which did not include the locus of the cutting*, as will presently appear, was a certified copy of a deed of assignment of that same mortgage, describing the land mortgaged as follows:— (Here the Judge read the description of the premises in the assignment.)

In connection with the plaintiff's testimony which the jury believed, we have here conclusive evidence, and *introduced by the defendant himself*, that the grass was not cut on any part of the premises to which that assignment or the mortgage which it assigned gave any interest to the defendant, for the premises described therein are, as we have seen, the southern part of lot No. 10, whereas the plaintiffs, whom the jury believed, swore that the grass was cut on the north part of lot No. 10. They so proved it, and *defendant produced no evidence that disproved that fact*. This, if it were not too decisive to be susceptible of confirmation, would be confirmed thus: A document, though bearing date *several years subsequent to the conversion complained of*, was introduced by the defendant. It is a certified copy of an assignment under insolvency, executed to him by McKenzie when under execution and insolvency. (Here the Judge read the description in the assignment.) Observe, the defendant thus, *long after the time when he had sworn that he first became possessed of and entitled to the land on which the grass was cut*, took this assignment of the interest which McKenzie then claimed to have in a lot thus described, viz.: "Situated between the lands of *Neil Brodie*," (that is the land which the defendant, at the trial, claimed under the assignment from McLean,) "which I," (McKenzie,) "claim to have an interest in, and more particularly known as part of lots Nos. 10 and 11." If it be enquired *what part* of No. 10 was thus claimed by McKenzie, which he *then for the first time* transferred to defendant, the answer is inevitably certain, viz.: "The *Northern* part of No. 10," on which the plaintiffs under McKenzie cut. It is undeniably so, because the mortgage assigned to defendant—his only pretence

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to title proved—*did not, as we have seen, include the Northern part of lot No. 10*, and because he at the trial gave no proof of any interest in that northern part lot No. 10, otherwise than under the insolvent assignment from McKenzie, or before the date of it, which was in 1873, the grass having been cut in 1867.

Moreover, in accordance with the description in the assignment of mortgage, which excludes the northern part of No. 10, is the testimony of the plaintiff, McLean, the mortgagee, in these words: "The mortgage was not on the premises on which we cut, nor was any claim of mine." Now, I should really have been glad to have heard some answer given to this evidence, given by a plaintiff whom the jury believed, and that not even attempted to be controverted at the trial by the defendant. Thus it is irresistibly clear that when the defendant converted the hay, he had no interest in the land on which it had been cut. What wonder, then, that the jury found that, at the time in question, McKenzie was in possession of the land, and had an interest in the grass then growing thereon. If they thought the plaintiffs worthy of credit, it was not possible for them to find otherwise. I must add that it could not be matter of wonder that the jury discredited the defendant's testimony as they must have done, since he shewed himself at the trial in giving testimony, thus in direct conflict with two other witnesses.

Plaintiff, McLean, swore defendant said, "he would rather burn barn and the hay in it than we should get one spear of it. *He brought from the house cards of matches.*" Philip Fraser said; "Defendant was at the barn and *had matches. I saw him take them out of his pocket, hold them up, and I heard him say, 'I would rather the barn should be burned than I would let a spear of the hay go.'*" In the face of this positive concurring and circumstantial testimony of two witnesses, the defendant said in the witness box, but before he had heard the testimony of Fraser, which was given after the defendant rested, "*I produced no matches that day. I may have said I would sooner see the barn burnt.*" I am very glad that I knew nothing of him outside the cause. The

ury may have had reason to give more credit to the testimony of plaintiffs than to his. I may add a few words explanatory of the reason for the second question submitted to the jury. That will be found in the following parts of the minutes, (viz., at lines 98, 172, 232,) showing matter of evidence open to a possible inference that the plaintiffs were acting collusively with McKenzie against the defendant. The existence of such, as has been already seen, the jury negatived by their answer. I was entirely satisfied with the verdict at the trial and regret to say, as unanimity does not pervade the Bench, that I am so still. Considering how often this Court have refused to disturb the verdict of a jury of very questionable propriety, on the mere ground that there was evidence enough to support it, I must confess myself unable to perceive on what ground this verdict, in a case *in which the only possible misdirection consisted in putting questions necessitated by the issue, and which alone under the evidence could have been put*—I cannot perceive, I say, on what ground this verdict can be set aside.

The rule in my opinion should be discharged.

MCDONALD, J., concurred with the learned Judge in Equity.

SMITH, J., concurred in the opinion of Mr. Justice WILKINS.

SMITH v. FULTON ET AL.

Where the managing owner and the master of a ship order necessities for the navigation of the ship on credit, the owners are liable. The Certificate of Registry is presumptive evidence of the ownership. (See R. S., Chap. 96, sec. 103.)

This was an action against the owners of a vessel to recover the amount of a promissory note made by the managing owner and the master for supplies furnished to the vessel. The cause was tried before YOUNG, C. J., in Halifax, in

November, 1876, and a verdict found for defendants. A rule *nisi* to set the verdict aside was granted on the ground that the verdict was against law and evidence, and argued 16th December, 1876.

James, Q. C., in support of rule.—The point of this case is whether there was sufficient evidence of ownership of the vessel given at the trial. Evidence was given that the defendants acted as owners of the vessel, but the principal evidence given was a certificate of the registry of the vessel and owners. There is a singular mistake running through the text books on this point, arising from an erroneous heading to one of the cases decided about the time of the passing of the Merchant Shipping Act of 1854. See *Merchants' Shipping Act*, 1854, sec. 37; also *Evidence Act*, page 543 of the Revised Statutes of N. S. The points I take are, that the certificate of Registry is *prima facie* evidence of ownership, and that the owners are, *prima facie*, liable for supplies furnished to the vessel. In a maritime country like this, it is extremely important that a man should know who is responsible for supplies he may furnish. Since 1813, there has not been a single case shewing that the certificate is not *prima facie* evidence of ownership. The clause, 107, in the Merchant Shipping Act, was introduced while three or four cases were pending, argued but undecided. In *3 Camp.*, 456, in 1813, Lord ELLENBOROUGH held that the defendant could not be held bound by the Certificate of Registry, unless it was shewn that he had taken the oath; but in *17 C. B.*, 57, in 1855, is a case to which a wrong head-note has been affixed. From a case in 1824, in *Ryan & Moody*, down to the case reported in *L. R.*, 1 *Q. B.*, 534, there is no case touching this point. In *Myers v. Mills*,* there was evidence that the party whose name appeared in the Registry, was not the real owner. In *18 C. B.*, 886, is a report of the appeal, on which the decision of the Court of Common Pleas was confirmed by the Exchequer. *Frost v. Oliver* was decided in the same way, on rebutting testimony. The case of *Hibbs v. Ross*, *L. R.*, 1 *Q. B.*, 534, decides this whole matter.

Rigby, Q. C., contra.—The only way these defendants can

* *17 C. B.*, 57.

be made liable is by proving that the contract was made with them, or with their authorized agent. There is no proof here that the captain bought the goods for the owners of the vessel. The only evidence is that the goods were supplied for the vessel, and were necessary, and no evidence that they were supplied on the credit of the owners. The Statute is no doubt *prima facie* evidence of the parties named in the certificate being owners, but something more is necessary here. The vessel may have been in possession of somebody else. Cites the *Case of the Great Eastern*, L. R., 2 Ad. & Ec., 88. There is no proof here that the captain was acting for the owners in purchasing these supplies. *Non constat* that the master was not sailing the vessel for the mortgagees, or for a charterer. *Beldon v. Campbell*, 6 L. & E. R., 473. These owners lived within easy telegraphic and railway communication of St. John, and the master could not have bound these owners without communication being held with them; 7 *Man. & Gr.*, 336; 5 *El. & B.*, 419.

SMITH, J.—The necessity of the case is what enables the master to bind the owners.

Rigby, Q. C., cites 17 *C. B.*, 109. It is a very important fact in this case that we have a verdict, after his Lordship who tried the cause had left all the evidence to the jury. Is there not sufficient evidence here to uphold the verdict?

The first note was signed by *C. A. Fulton*, with the initials "M. O.," supposed to mean managing owner, and by the Captain, *Heustis*; a second note was given when the first one matured, signed by *C. A. Fulton* alone, with no initials after the name. We contend that the second note was accepted by the plaintiff in discharge of the first. We raised that issue and the jury found for us; 5 *Espinasse*, 122.

James, Q. C., in reply.—Cites 4 *C. B.*, *N. S.*, 412, cited in *Fisher*, 7894. We had evidence ready to rebut any evidence, if given, that the second note was accepted in discharge of the first. A captain cannot borrow money to pay for supplies, but he can buy supplies on the credit of the owners without consulting them.

YOUNG, C. J., now (February 5th, 1877), delivered the judgment of the Court.

On the trial of this action there arose, for the first time in this Court, a question as to the legal effect of Section 31 of our Evidence Act, (Revised Statutes, Ch. 96,) founded on Section 107 of the Merchants Shipping Act, 1854. This was the main ground of the motion for non-suit, but, after looking into the cases, it was manifest that the certificate of Registry of a British ship much be received as *prima facie*, or, as our Statute expresses it, as presumptive proof of all the matters contained or recited in such Register. It was the sole evidence of the defendants here being part owners of the ship, and must be held to be enough. The ship is owned in Nova Scotia, and the action was brought for necessities to a small amount supplied to her in New Brunswick, at the instance of the managing owner and master, both of them part-owners, and who gave notes for the amount, not paid. Now the registered owner of a ship is *prima facie* liable for goods furnished for the use of that ship, but such liability may be rebutted by evidence of the credit having been given to others; *Cox v. Reid*, Ryan & Moody, 199. In *Abbott on Shipping*, (5th American Ed.,) 134, it is laid down, "with regard to the repairs of a ship and other necessities for the employment of it," that "one part owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against," which does not appear here. In *Whitwell v. Perrin*, 2 C. B., N. S., 416, BYLES, J., says: "Since the case of *Mitcheson v. Oliver*, 5 El. & B., 419, the law is restored to what it formerly was, viz., that the mere fact of a man being owner or part owner of a ship, or registered as owner, does not make him liable for work done or goods ordered for the ship: but, as JERVIS, C. J., puts it in *Brodie v. Howard*, 17 C.B., 109, the question is, with whom was the contract? Was the party giving the orders the agent of the owners for that purpose?"

In the case in hand the managing owner and master, who had charge of the ship, combined in giving the orders, not for any extraordinary outlay, but for supplies necessary for the navigation

of the ship, and the main question of ownership having been decided in favor of the plaintiff, and the other question of liability being peculiarly for the jury, we think that the verdict for the defendants should be set aside, and the rule for a new trial made absolute.

LECAIN *v.* HOSTERMAN.

J. H. and C. H. were tenants in common of an undivided parcel of real estate. Plaintiff bought C. H.'s interest under a judgment duly recorded against him. C. H. and his widow, after his death, remained in possession of the land, and some time afterwards plaintiff brought an action for use and occupation, adding a count for mesne profits. No contract, express or implied, between plaintiff and the widow of C. H. was proved.

Held that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits, as there had been no previous recovery in ejectment by plaintiff; and that, even if a contract had been proved to sustain use and occupation, the non-joinder of J. H. as a plaintiff was fatal to the action as brought.

This was an action for use and occupation and for *mesne* profits, tried before McDONALD, J., in May, 1875, at Halifax. A nonsuit was consented to by plaintiff's Counsel on the recommendation of the Judge, and a rule *nisi* granted to set it aside.

Hosterman died leaving two sons as tenants in common of his land. Charles' share was sold under judgment obtained by W. M. Gray against him, and bought by plaintiff, who took proceedings for a partition, which was made by final order confirming partition, August 12, 1873. The widow was in possession until August 31, 1873, of the *locus* set off to LeCain, and LeCain claims in his action for occupation and *mesne* profits from the death of her husband down to the time of her ceasing to occupy.

The cause was argued during the December Term, 1875-6, before YOUNG, C.J., and DESBARRES, WILKINS, and SMITH, JJ.

Rigby, Q.C., in support of rule.—The question is whether

the action can lie either as to the period before the confirmation of partition or afterwards. (YOUNG, C. J.—We cannot entertain the action as to the nineteen days after August 12th, at \$100 per year. The amount is too small.) *Rigby, Q.C.*—That objection was not taken.

Mrs. Hosterman was merely tenant at sufferance. There is no proof that she demanded her dower. It would not follow, even if she had a right to dower, that she could hold the whole. She has no right to dower until set off. She did not claim to be there as of right, but it is admitted that it was by permission of *LeCain*. She was accountable to *LeCain* as tenant in common with *John Hosterman* and, subsequently to the partition, as tenant of the severalty. If it is argued that *John Hosterman* must be joined, there should be a plea of non-joinder. Cites 1 *Washburne, R. P.*, 158, 159. *Woodfall, Landlord & Tenant*, 88; *Tudor's L.C.*, 46; *R. S.*, cap. 102, sec. 29. We claim *mesne* profits from the date of the sheriff's deed to *LeCain* until he secured his possession. If we had ejected, we would have a right to *mesne* profits from the time the title was shown until we got possession. We can surely recover as much where the possession was got without ejectment.

McCoy, contra.—The question here is whether the action for *mesne* profits will lie for the period that the property was in dispute. An action of ejectment is necessary to an action for *mesne* profits, and it proceeds on the ground that the sheriff then elects to treat the defendant as a trespasser. See *Selwyn's N. P.*, 760. The claim for *mesne* profits being thus a claim against a trespasser is inconsistent with the claim for use and occupation. 2 *Waterman on Trespass*, 596. *L. R.*, 4 *Exch.* 92. The plaintiff is not put in possession until after the judgment in partition, and cannot claim rent for the land until he has possession, which must be in severalty, *Addison on Torts*, 303.

As regards use and occupation, cites 13 *M. & W.*, 12. The other co-tenant should have been joined. *Bullen & Leake*, 469. It is not necessary that the non-joinder should be pleaded. It can be taken on motion for non suit. The action for *mesne* profits is for a tort. *Taylor on Landlord & Tenant*, sec. 25 & 636.

In the action for *mesne* profits, the party must show a re-entry after a recovery in ejectment; *Roscoe N. P.*, 578 (11 ed.) *Cole on Ejectment*, 634.

Rigby, Q. C., in reply.—Under the count for *mesne* profits we can recover here. It has not been shown that the count is a bad one. The case *Piers v. Coke*, L. R., 4 Exch. 92, shows that the plaintiff can recover *mesne* profits apart from ejectment altogether. Ejectment itself was originally merely an action for damages, and afterwards for the land; but subsequently to that the two causes were combined.

There is a re-entry here. The defendant gave up the possession to the Plaintiff after the time agreed upon between her and the plaintiff's solicitor.

As to the point that we cannot recover for the profits while the land was in dispute,—there was no litigation with this defendant. The partition suit decided that *LeCain* was a tenant in common with *John Hosterman*. He had title at the time he got the Sheriff's deed, and the partition suit so decided it. The only question therefore is whether a tenant in common can maintain an action under these circumstances. If there is a tenancy the action is for use and occupation. If the party is a wrong doer, it is for *mesne* profits. Here we claim in both forms. Cites *1 Washburn*, 435. If an action for *mesne* profits cannot be brought without ejectment, there is no remedy for a case like this. *3 Wilson*, 118.

There is no plea setting up that there was no recovery in ejectment. Cites *4 Taunt.*, 720; *R. S.*, cap. 104, sec. 15 (p. 582.)

DESBARRES, J., now (February 5th, 1877) delivered the judgment of the Court.

The plaintiff by his writ seeks to recover a sum of money named in his particulars for the use and occupation of a dwelling house and lands by his permission, and by a second Count, added by leave of a Judge since the issuing of the writ, claims damages from defendant for having, as he alleges, improperly and without any lawful right occupied a certain messuage and lands, &c., of the plaintiff, at the N. W. Arm, in the county of Hali-

fax, and taken and received during such occupation, all issues, profits and beneficial use of said messuages, &c., whereby he was greatly injured. This case was argued before the full court during the present term, under a rule granted by the learned Judge who tried it for setting aside the non-suit, which, at the close of the plaintiff's case, he directed to be entered. Having since looked into and considered the case, I have arrived at the conclusion that the non-suit was rightly entered and ought not to be set aside. As to the first count, founded, as it is, on the relation of landlord and tenant, it is clear that to sustain it there must be an occupation by the permission of the plaintiff, under a contract, express or implied, made with him by defendant. It was therefore incumbent on the plaintiff to show that the defendant occupied the house and premises which he claims as his tenant and with his consent, but the plaintiff entirely failed to prove that important fact, on which alone his right to recover upon that count depended. So far from proving that fact, the evidence produced goes to show that the defendant held adversely to the plaintiff, under a claim of right of dower in that and other property as the widow of Charles O. Hosterman, who, as one of the devisees under his father's will, became the owner of an undivided half-part of his father's estate, of which the house and premises, claimed by plaintiff, and for some time occupied by defendant, formed part. It appears that all the right and title thus acquired by Charles O. Hosterman in his father's estate was sold under execution by the Sheriff of the County of Halifax, who, on the 30th of Dec., 1868, executed a deed thereof to the plaintiff as the purchaser at such sale, and that, when this deed was executed, Charles O. Hosterman and his family occupied the house and premises, and continued to occupy it until 1870, when he died. After her husband's death the defendant together with her family, without having made any contract or agreement with the plaintiff for that purpose, continued to hold and occupy the same house and premises for which the plaintiff now claims rent, not by permission of the plaintiff and as his tenant, but adversely to the plaintiff and under a claim of right of dower, which she undoubtedly had in all the lands, &c., of which her husband had been the

owner as tenant in common and co-devisee with his brother John, the title to which had passed to the plaintiff under the Sheriff's Deed—see 1 *Washburn on R. P.*, 158; *Tudors L. C.*, 46; 4 *Beav.*, 103. This adverse holding therefore by the defendant being wholly inconsistent with the relation of landlord and tenant, precludes the plaintiff from recovering under the first count in his writ for use and occupation. In *Tew v. Jones*, 13 M. & W., 12, where the defendant and another person conveyed to the plaintiff an undivided moiety of several houses of which they were seized in trust; of one of these houses the deft. had long before been in possession and continued to occupy after the conveyance. It was held that such an occupation did not of itself entitle the plaintiff to sue him for use and occupation. POLLOCK, C. B., said—"There must be some evidence of a holding by the permission of the plaintiff. Here the defendant having conveyed a moiety of five houses to the plaintiff, remains in possession of one. There is no evidence of a tenancy in that." But there is another objection to the maintenance of an action by plaintiff for use and occupation, and that is, that while the defendant occupied the house and premises for which rent is sought to be recovered under the first count, the plaintiff had no individual right therein, being, until the 12th August, 1873, when the partition of the property was confirmed by the Court, a tenant in common with John Hosterman, who has not been joined as a plaintiff in this suit. The omission in actions on contract of a party as plaintiff is fatal, except in the case of executors; *Jones v. Smith*, 1 Exch., 831. See also *Day's Com. Law Proc. Act*, 39, where it is laid down that, where the objection arises or is made at the trial, it would, unless amended, lead to a non-suit or to an adverse verdict, as it was held in *Chanter v. Leese*, 4 M. & W., 295. The objection in this case was made at the trial as a ground of non-suit, but no amendment was moved for or made, and therefore, if any proof of a contract had been produced, which it is clear from the evidence of Mr. Gray was never made, the non-joinder of John Hosterman as a plaintiff must still have resulted in a non-suit.

It now remains to be considered whether, under the circumstances of this case, the plaintiff can legally recover upon the

second count, irrespective of the non-joinder of John Hoster-
man as a plaintiff, for the issues and profits of the premises while
held by the defendant in the manner I have described. In
Aslin v. Parkin, 2 Burr., 665, LORD MANSFIELD lays it down
as law, that an action for "mesne profits is consequential to the
recovery in ejectment. It may be brought by the lessor
of the plaintiff in his own name, or in the name of the
nominal lessee, and in either shape it is equally his action. The
tenant is concluded by the judgment and cannot controvert the
title; consequently he cannot controvert the plaintiff's posses-
sion, because his possession is part of his title." "There is," he
says, "no distinction between a judgment in ejectment upon a
verdict and a judgment by default. In the first case the right
of the plaintiff is tried and determined against the defendant;
in the last it is confessed." Here the plaintiff under this count
seeks to recover *mesne* profits for premises to which the right
of the plaintiff has not previously been tried or established by
any previous action of ejectment or judgment by default, and we
are now called upon to decide whether the law laid down in
Aslin v. Parkin is still applicable to this case, or whether a
recovery for *mesne* profits may be had without first trying the
plaintiff's right of property and obtaining possession of the land.
No case was cited at the argument, and I would be very much
astonished if any could be found, in which an action of trespass
for *mesne* profits was brought before the plaintiff's right was
tried in the manner stated in that case, in conformity with a
practice which universally prevailed while I was at the Bar,
and which has never until now, to my knowledge, been depart-
ed from since I have been on the Bench. The law and practice
of the Court in relation to actions of ejectment and for *mesne*
profits in my apprehension has undergone no material change
since the Practice Act (Rev. St., Ch. 94), has been in force,
other than that these, like all other actions, are to be prosecuted
and defended in the names of the real parties concerned. With
this difference the law and practice applicable to both are still sub-
stantially the same as they were before that Act was passed.
See *Roscoe's N. P. Evid.*, 574; *Cole on Ejectment*, 634;
Selwyn's N. P., 760-1; *Waterman on Trespass*, (12 Ed.)

594 ; in all of which books it will be found that the action for *mesne* profits is and has always been considered as consequent upon a recovery in ejectment, without which it cannot be maintained.

For the reasons given I am of opinion that the plaintiff is not entitled to recover upon either of the counts declared upon, and that the rule for setting aside the non-suit must be discharged.

GARHATT v. GOOSELEY.

In an action for trespass to land, the defendant proved the establishment of a conventional line with the person from whom plaintiff claimed, giving the *locus* in question to defendant. Plaintiff and defendant both proved subsequent acts, indicating ownership, performed by them respectively, on the *locus*. To the question, "If S. G., when proprietor of the land of plaintiff, had met C. G. and the defendant on the land in question, and agreed with them as trustees of the A. Church property, that the western side of the stone wall should be the western line of the land known as the A. Church property," the jury returned this answer, "he (S. G.) said so," and found a verdict for plaintiff. S. G. did say so in his testimony at the trial and was not contradicted.

Held, that the verdict must be set aside.

This was action of trespass, for taking down a stone wall alleged to be on plaintiff's land, with a count in trover, for removing and converting the stones of the wall. Defendant pleaded in justification that the wall removed was on defendant's land. Plaintiff, by leave of a Judge, pleaded a new assignment, and added counts of trespass and trover ; the defendant denied the trespass in the new assignment, and pleaded two pleas of justification to added counts, setting out that they were for the same trespass, and limited plaintiff to a trespass committed on defendant's land ; on those pleas plaintiff joined issue.

The cause was tried before Mr. Justice SMITH, at Liverpool, in October, 1876. A verdict was found for plaintiff, and a rule *nisi* to set the verdict aside granted by the learned Judge, and argued January 12th, 1877.

McCoy, Q. C., in support of rule.—There is no proof of pos-

session in the plaintiff. There is no trespass proved different from that justified in the pleas to the original declaration and added counts. The new assignment is really an exact repetition of the declaration to which we had pleaded a justification.

The defendant has the right to restrict the plaintiff to one cause of action and to justify it; *1 Waterman on Trespass*, 222; *B. & L.*, 653; *1 Q. B.*, 77; *2 M. & W.*, 395. The new assignment here states that the trespass is as to the same stone wall. See *Saunders on Pl. & Ev.*, Vol. 2, pt. 1, p. 436; *1 Chitty on Pl.*, 629. It is not sufficient merely to state in the new assignment that the plaintiff proceeds for other and different trespasses than those mentioned in the plea; he must shew by the new assignment that they are different, and set them out. There must be evidence of trespass in another place and at a different time from that mentioned in the plea. The new assignment waives any claim for the trespass mentioned in the plea; *1 Chitty Pl.*, 630; *Addison on Torts*, 970, 971; *6 M. & W.*, 295; *B. & L.*, 653-4. Under the added counts also the plff. should have proved different trespasses from those mentioned in the plea; he has not done so. The plaintiff cannot prove one and the same trespass under two counts; *Lambert v. Hodgson*. *1 Bingh.*, 817; *7 M. & G.*, 316; *2 Waterman on Trespass*, 491. Cites also *6 M. & W.*, 174; *5 Bing. N.C.*, 550; *2 Saunders Pl. & Ev.* (pt. 1), 299 & 432; *2 T. R.*, 177; *6 Mod. R.*, 120; *Roscoe's N. P. Ev.*, 839. For these reasons the evidence of the tearing down of the stone wall mentioned in the plea of justification should not have been admitted to prove the new assignment or added counts.

As to the facts—a conventional line was proved by the two Gooseleys. See *Woodberry v. Gates*, Thomson's Rep., 255; *James' Rep.*, 1 & 69. The pleas of justification to added counts have been proved, and plaintiff adopted the restricted sense put on his declaration by those pleas by joining issue on them; *B. & L.*, 564.

Meagher (with whom was *Henry*), contra.—The jury have found that the wall was on plaintiff's land; they have found also that we were in possession—we have taken issue on the plea of justification. The added counts cover everything. The

defendant has not proved any justification in respect of rebuilding the walls. He has neither pleaded nor proved a justification to the count in trover for taking away the stones of the wall. Cites *8 El. & Bl.*, 1.

YOUNG, C. J.—By setting up in your added counts the same matters alleged in the original declaration, you attempt to do away with the principle that a new assignment admits the previous pleadings.

Meagher.—Our new assignment is accompanied by a denial, and leave, of the pleas of justification. But there is really no plea to the count in the declaration for converting the stones, and consequently the verdict is sustained as to that count.—*Hitty, Jr., Prec. in Pleading*, 721 ; *12 M. & W.*, 582.

The COURT.—The question really is as to the conventional line.

Meagher.—The deeds under which defendant claims, describe his land as running to the wall, not as covering it. The wall was on plaintiff's land. It is true, parol evidence of a conventional agreement, making the wall a party-line, was given, but the jury have disbelieved that evidence. If the boundary was settled by *Jones* as defendants contend, there was no necessity for the subsequent settlement of it, which they try to prove. The defendant has not proved his plea of leave and license from the trustees. It is a singular fact that there is uncontradicted evidence that *Garhatt* repaired this very wall from time to time without objection from the defendant. Admitting that defendant repaired the wall also, though the evidence of that is not strong, the common user would shew the wall to be common to both parties, and not defendant's. *Hunt on Boundaries*, 14, 113, 120.

Henry.—We are in the same position in this cause as if a general verdict only had been given and no answer to written questions ; *Cann v. Imperial Insurance Co.*, 1 R. & C., 240. If any objection was to be taken to these pleadings it should have been by demurrer or special motion. The plaintiff may now assign and reply at the same time in case of a continuing trespass ; *12 M. & W.*, 582 ; *13 M. & W.*, 781 ; *12 Q. B.*, 835 ; *5 Taunt.*, 20.

McCoy, Q. C., in reply.—It is a singular fact that in not one of the deeds under which plaintiff claims is the stone wall mentioned; that fact goes to shew that the wall was not on their property. It is true one witness states that *Smith Jones*, who formerly owned both properties, pointed out the boundary of defendant's land as being along the inside of, and not including the wall; but *Stephen Gooseley*, who once owned plaintiff's property, having bought from *Smith Jones* seven years after *Jones* sold the other property, swore that his line, pointed out by *Jones* himself, did not include the wall. *William Gooseley* also swears to an agreement seven years after *Jones* sold the property now belonging to plaintiff, between the then owners of the land, fixing the boundary so as to put the whole wall upon defendant's land.

WILKINS, J., now (February 5th, 1877,) delivered the judgment of the Court:

The learned Judge who tried this cause evidently attached much importance to the evidence which shewed the existence of a conventional line, that, if established, would be decisive of the case in favor of the defendant. Referring to the evidence on that point, he asked the jury to say, "if Stephen Gooseley, when proprietor of the land of plaintiff, had met Charles Gooseley and the defendant on the land in question and agreed with them, as trustees of the African Church property, that the western side of the stone wall should be the western line of the land known as the African Church property?" A careful examination of the evidence shews by the testimony of Charles Gooseley and Stephen Gooseley the affirmative of that question, and, although the plaintiff had, after that testimony was given, ample opportunity afforded him to contradict it, no evidence in contradiction of it or that affected it was adduced. If such conventional line was then agreed upon by the then conterminous proprietors without fraud, mistake or surprise, and none such appeared, it shewed the agreed eastern line of the then owner, in whose shoes the plaintiff stood at the trial, to be the western line or face of the stone wall, and as a consequence, shewed that there was no foundation for the plaintiff's verdict. The evidence—

very strong evidence—though not altogether, perhaps, uncontradicted, shewed that that convention was afterwards acted upon by the trustees in relation to their dealing with the wall. There is, also, very strong evidence, though to some extent contradicted inferentially, that, at the original laying out of the land of the trustees, the party from whom they derived title fixed the western face of the wall as the boundary of plaintiff's land towards the east; in accordance with the subsequent proved convention. I have spoken of defendant's acting in regard to the wall subsequently to the convention, as to some extent contradicted. The evidence scarcely warrants my observation in the last respect. I might, with more propriety, have omitted the qualification, for the evidence of any act done by plaintiff, or under him, does not amount to proof that any substantial repair to the wall was ever done by or for him during the eight years of his title previous to the trial. The jury answered the question spoken of by me as submitted by the learned judge thus:—"He (Stephen Gooseley) said so."—He did, indeed, say so, and another witness confirmed what he said, and, as already observed, no witness gainsayed what he said. There was, therefore, on this point, no question of conflicting statements to be settled by the jury. Why should not the learned Judge have declared, on the authority of decided cases, what the law was governing the state of facts that was not in controversy, as he in fact did? (See *Michell v. Williams*, 11 M. & W., 205.)

I am of opinion that the state of facts referred to, in view of the authorities, renders it our duty to set aside this verdict, which rests on evidence of the most unsatisfactory character.

LEBLANC v. McRAE.

The foreman of a jury which found a verdict for defendant, was a cousin of defendant's wife ; this fact was not known to plaintiff till after verdict, though his attorney stated to defendant's attorney before the jury announced their verdict, that, if it was for defendant, it would be set aside on account of the relationship ; the Judge who tried the cause was satisfied with the verdict found.

The Court refused to disturb the verdict.

This cause was tried before Mr. Justice SMITH, at Port Hood, in 1876. A verdict was found for defendant, and a rule nisi to set the verdict aside was granted by the learned Judge who tried the cause on the ground that one of the jurymen was related to the defendant. The rule was argued January 10th, 1877, before four Judges.

Thompson, in support of rule, reads affidavit of plaintiff's attorney, alleging ignorance of the juror's relationship to defendant until the jury were about to render their verdict. Offers to read affidavit of plaintiff made pursuant to leave of the Judge within fourteen days of the granting of the rule *nisi*.

Graham, contra, objects that the affidavit cannot be read, not being mentioned in the rule. That practice is well established ; 2 *Ch. Arch.* 851.

THE COURT. It is clear that this affidavit is here by leave of the Judge, sitting as a Court, and that you have had notice of it. We admit it.

Thompson reads affidavit. The case on which we rely is *Lynds v. Hoare*, 1 R. & C., 327, recently decided in this Court. There is another case in point in *Hilliard on new Trials*, 152.

Graham, contra.—Reads affidavit of *E. D. Tremain*, defendant's attorney, to shew that plaintiff's attorney knew of the relationship before the verdict.

In *Fisher's Dig.*, 6118, the case of *Pearman v. McKay*, is cited from 6 Jur., where the fact that a jurymen was interested in the verdict as a Common Councilman was not brought to the notice of the Court till after verdict, and a rule for a new trial was refused. Cites 2 *Gray* 281, 4 *Eng. L. & E. R.* 244, 1 R.

& C., 53; 21 Pick., 471; 10 Pick., 275; Hil. N. T., 153, *Stevens N. B. Dig.*, 295; 3 *Hurlst & N.*, 868; 7 *Price*, 203; 8 *Barn. & Cress.*, 417; *Fisher's Ann. Dig. for 1874*, under "Jury"; 30 *L. T., N. S.*, 721.

Thompson, in reply.—In this case the relationship was not discovered till the trial was concluded, and the jury were about to give in their verdict. It was then too late to stop the trial. Refers to case cited in *Fisher's Digest*.

McDONALD, J., now (February 5th, 1877), delivered the judgment of the Court.

This cause was tried before Mr. Justice SMITH, at Port Hood, and a verdict was rendered in favour of the defendant. A rule *nisi* was granted to set the verdict aside on the ground, as shown by affidavits, that the foreman of the jury was a cousin of the defendant's wife. The affidavit of the plaintiff's attorney, upon which the rule *nisi* was obtained, shows that he was not aware of the relationship until the jury had returned into court for the purpose of rendering their verdict; but the affidavit of the defendant's attorney, though it does not contradict the other, shows that the plaintiff's attorney told him that if the verdict should be in favor of the defendant, it would be set aside for the reason mentioned. This was before the jury gave their verdict. The plaintiff was not aware of the relationship till after verdict. This case is different from *Lynds et al. v. Hoar*, 1 R. & C., 327, in which a verdict was set aside on account of the relationship between two of the jurors and the defendant, because in that case, though some of the plaintiffs, who were, in point of fact, but nominal plaintiffs, did not show that they were ignorant of the relationship till after verdict, yet the plaintiff who caused the suit to be instituted, who was responsible for the result, and instructed counsel throughout the cause, showed clearly that he was entirely without knowledge of the relationship till after verdict. There the Judge who tried the cause was dissatisfied with the verdict—here he is not. English authorities maintain the right of the Court to exercise a sound discretion in cases of this kind. See *Earl of Falmouth v. Roberts*, 9 M. & W.,

469; *Hill v. Yates*, 12 East, 229; *Williams v. Great Western R. Co.*, 3 H. & N., 869. I think the discretion was properly exercised in the case of *Lynds v. Hoar*, but I do not think that, after the admitted facts in this case, the discretion of the Court would be well exercised if a new trial were granted.

In the case of *Doe v. Earl of Ashburnham v. Michael et al.*, 16 Q. B., 620, when the cause, which was to have been tried by a special jury, came on, and the jury were being empannelled, a special jurymen, who was in attendance to try another cause, answered by mistake to a name called in the cause on trial, and he served on the jury. The mistake was not discovered till the jury had returned into Court after deliberation, and were being called over before giving their verdict. The defendant then, at once, objected to take a verdict so found, and because he did so object it was held to be a mistrial and a *venire de novo* was granted; the court saying that, if the mistake was discovered after verdict, the question would have been a very different one, and many considerations might have entered into the discussion which might have induced the court not to disturb the verdict. So, in *Dovey v. Hobson*, 6 Taunt., 460, a rule for a new trial was granted on the ground that the objections to the juror being known before verdict, the plaintiff's counsel was apprised, at the time that he took the verdict, of the peril of not being able to hold it. *Wells v. Cooper*, 30 Law Times, N. S., 721, which is the last case I have seen on this question, affirms the different decisions to which I have referred, and draws distinctions so clear that it seems impossible to misapprehend where the exercise of the discretion of the court ought to begin and to end, in cases like the one before us. If in this case the plaintiff's counsel had taken the exception when he became aware of the existence of the relationship, which was before the verdict, he might now seek for a new trial with an entirely different case, but he has chosen to run the risk of an adverse verdict and to depend upon a mistake to have it set aside if adverse. It does not appear by the affidavits or otherwise, that the verdict was against the evidence, or that any injustice was done, and I am of opinion that the rule nisi must be discharged.

MEEK v. GASS.

Plaintiff, who had purchased defendant's stock in trade and leased his premises at S., gave defendant his note for \$200, in consideration that defendant would sell the good will of his business to plaintiff, and would not interfere with him for the term of five years. This agreement was not in writing. Defendant, within the period of five years, returned to S. and set up business there, so as to interfere with plaintiff.

Held, that, while plaintiff could not recover for breach of this agreement, not being in writing, and not to be performed within one year, he could recover under the common counts for money paid, and that his verdict for \$200 must be sustained.

This was an action brought to recover damages for breach of a verbal agreement respecting the lease and sale of certain premises, and the good will of a certain business in Shubenacadie; the common counts were also added to plaintiff's declaration, for money paid by him for the good will of the business. The cause was tried before Mr. Justice DESBARRES, at Halifax, in April, 1876, and a verdict found for plaintiff for \$200, the amount alleged to have been paid by him for the good will of the business and as a consideration for a promise by the defendant not to do business at Shubenacadie within five years. A rule nisi to set the verdict aside on the grounds that the verdict was against law and evidence, that the learned Judge had misdirected the jury, and that evidence had been improperly received, was granted by the court and argued before four Judges, January 9th, 1877.

Sedgewick, in support of the rule.—The learned Judge misdirected the jury in regard to what constituted the good will of the business. The plaintiff swore he gave the defendant his note for \$200 for the good will of a business worth a nett profit of \$3000 a year, and also that, in consideration of the \$200, defendant promised not to do business, in the same place, within five years. Defendant denied the latter part of the statement, and we complain that the learned Judge instructed the jury that defendant's statements involved an anomalous view of what constituted "good will." See *Joyce on Injunctions*, 500. The good will of a business is not easily defined, but does not necessarily involve the idea that the vendor shall not do business again in the same place.

There is a variation between the declaration and the proof. The declaration alleges that the \$200 was paid for the good will of the business only. Cites *6 Beav.*, 276, for definition of good will of business.

An agreement such as is here sought to be recovered on should be in writing, under the statute of frauds, being for more than a year. This case is one which should certainly not be made an exception from the Statute. The lease and the other agreements relating to the transactions between the parties were in writing, while this was verbal. *Brown on Statute of Frauds*, 280. The case which goes against us is in *97 Mass. R.*, 208. There is no English decision in which this exception to the Statute is upheld. The reasoning of the American authorities is that an agreement like this might be performed within a year by the death of the party. But this contract, if good at all, can be enforced against the executors. *2 W. Blackst.*, 857; *Williams on Ex'ors.*, 1498.

Graham, contra.—The learned judge, while remarking that the defendant's understanding of the meaning of the "good will" was anomalous, yet told the jury clearly that, if they believed the defendant's testimony they should give him a verdict. This contract was completed on one side, by Meek, who paid the \$200, within the year; it is therefore not within the Statute. In the case of *Whitaker v. Walsh*, 2 Pugsley, N. B. R., 439, the facts were substantially similar to those in this case; there the Court held that an agreement to quit business for a year was not within the Statute, because money had been paid and notes given, and the contract performed by the other party. Cites *3 B. & Ad.*, 689; *10 U. C., Q. B.*, 630; *11 Metcalf*, 411; *11 Gray*, 168. No authority has been cited to shew that the defendant's executors could be prevented from carrying on the business. There is no need of referring to the evidence; the jury disposed of that.

Sedgewick, in reply.—Part of the consideration of this alleged contract was that plaintiff was to keep the premises for five years. Besides the note was for three years.

SMITH, J., now (February 5th, 1877,) delivered the judgment of the Court :

This is a rule *nisi* to set aside a verdict for the plaintiff for \$200. The cause was tried before Mr. Justice DesBarres, at Halifax, in March last. The declaration contains three counts setting out a special agreement and also the ordinary money counts. The agreement on which the plaintiff seeks to recover, we must assume to have been established by the findings of the jury. It appears that the defendant, in the year 1871, was doing business as a general trader, at Shubenacadie, in the County of Halifax, and that the plaintiff was then in his employ as a clerk; that the defendant agreed to sell and the plaintiff to purchase the stock in trade of the defendant for the sum of \$1441.16; and that a written lease of the premises, &c., where defendant lived and carried on said business, was then executed to defendant for the period of five years, at an annual rental of \$100 per annum. It was also agreed, as we must now assume to have been the fact, that in consideration of the sum of \$200 additional, for which the plaintiff gave to the defendant his note payable "thirty-six months after date," and which appears to have been received and accepted as an execution on plaintiff's part of the contract, he, the defendant, would sell the good will of the said business to the plaintiff, and would not interfere with him for the term of five years. The lease made no reference to this agreement, and it is admitted not to have been in writing. The breach assigned, and relied upon by plaintiff, is that the defendant did return to Shubenacadie within the specified period of five years, and set up business there of a like character as plaintiff's, and thereby interfered with him.

I think there is but one question here for the consideration of the court, the jury having found the issues in fact upon sufficient evidence against the defendant, and that is, whether the agreement, a breach of which is complained of, not being in writing, is within the operation of the statute of frauds. The 3rd Sec., Chap. 83, Revised Statutes, 4th Series, like the English Act, provides, "That no action shall be brought," among other cases given, "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum thereof, shall be in writing," and signed by the party sought to be charged thereby.

It was contended by counsel, at the argument, that the agreement in question came within the operation of this section of the Statute, as defendant's undertaking was not to be performed within one year, and not being reduced to writing, no action could be brought upon it. On the other hand it was urged on behalf of the plaintiff that it did not come within the operation of the Statute, because the contract was completely executed on the part of the plaintiff within the year. The position thus taken by the defendant's counsel opens up a question of some nicety and of considerable importance. I have not only looked, with great care, into the cases cited on the subject, but have examined all that were accessible to me. There are several cases among the English and American authorities which would appear to go the length of deciding, that an agreement whereby all that is to be done by the plaintiff, constituting an entire consideration for the defendant's promise, is capable of being performed within a year, and no part of what plaintiff is to do, constituting such agreement, is intended to be postponed until after the expiration of the year, is not within the statute of frauds, notwithstanding the performance on the part of the defendant is, or may be, extended beyond that period. In *Smith v. Neale*, 2 C. B., N. S., 67; in *Knowlman v. Bluett*, L. Rep., 9 Exch., it was held that the agreement was not within the Statute because *it might have been performed within the year*; but BRAMWEL, B., in the same case, declined to express an opinion that the statute of frauds did not apply when the consideration was executed, and said, "in *Souch v. Strawbridge*, (2 "C. B., 808). TINDAL, C. J., expressed an opinion that the statute "of frauds did not apply to an executed consideration; the other Judges neither assented or dissented." *Donellan v. Reed*, 3 B. & Adol., 899; *Cherry v. Heming*, 4 Exch., 631; *Bracegirdle v. Heald*, 1 Barn. & Ald., 722, are cases in point. There are several American authorities also which coincide with the doctrine laid down in the above cases. I must confess that, to my mind, if by these decisions the courts uphold a doctrine to the extent they would appear to do, viz., that an executed consideration is sufficient to take the whole agreement out of the operation of the Statute, they must virtually disre-

gard both its terms and the beneficial objects of its adoption. In *Smith's Leading Cases*, vol. 1, p. 145, *Donellan v. Reade* is severely questioned. "It may well be doubted," says *Brown* in his book on *Frauds*, sec. 290, "indeed, whether this doctrine would ever have been accepted in England, if the question had not uniformly arisen on cases where the stipulation sought to be enforced related solely to the payment of the money consideration. In such cases it is a mere point of form in bringing the action, the plaintiff's right to recover on the *indebitatus assumpsit* (which count is uniformly found to have been inserted in the declaration) being clear. It never has been held in England that an agreement to do some act after the expiration of a year, in consideration of a payment of money made presently, was binding." In *Cocking v. Ward*, 1 C. B., 858, *TINDAL, J.*, delivered judgment and held that an action on an agreement within the Statute of *Frauds* could not be maintained, although executed on the part of the plaintiff. In *Kelly v. Webster*, 12 C. B., 282; the court adopted this authority as sound law. It appears to me most difficult to reconcile those English cases which hold that the memorandum of the agreement must show the consideration, because the word *agreement* embraces the undertakings on both sides, with those which hold that the same word in the preceding clause, may embrace only the stipulations on one side. It occurs to me that the most reasonable and evidently the most consistent doctrine to apply to these classes of cases, is that so ably enunciated by *Ch. J. REDFIELD*, in delivering judgment in *Pierce v. Paine's Estate*, 28 Vermont R., 34. The character of the Court and the ability of the opinion give to this authority much weight, as remarked by *Brown* in his work on *Frauds*, p. 293. I quite concur in the view expressed by that eminent Judge, that, while no action can be sustained on the *agreement* itself, in the face of the words of the Statute already referred to, which are that no action shall be brought "unless the *agreement or some memorandum or note thereof shall be in writing*," yet, if the consideration be paid, within the year, or not, and the party who has received such payment or consideration repudiates the contract, and sets up the statute, a recovery back of the money

under the common counts can be had. The language of the Court in the case of *Souch v. Strawbridge*, is commented upon by Ch. J. REDFIELD, thus :—"If the contract has been performed on one side, in such a manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the party benefited by such performance. But when the contract, on the part of this party, was not to be performed within one year from the time it was made, the recovery is not upon the contract, but upon the *quantum meruit*, or *valebat*, or upon money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party." And again that learned Judge says :—"It is that portion of the agreement or the contract sued upon, which comes within the Statute by not being to be performed within the year, and not that portion of the agreement which constitutes the consideration of the promise sued upon. It will make no difference in regard to recovering the price of the consideration, whether it is paid down, or paid within the year, or after the expiration of the year; or whether it is agreed to be paid at one time or another. If it has been paid, so as to go for the benefit of the other party, at any time, and he does not perform the contract on his part, a recovery may be had, but not upon the special contract, if not to be performed in the year, but for the consideration paid, or performed by the plaintiff, and which came to the use of the defendant." It appears to me the opinion of the Court in this case must be acceptable to every legal mind. The object of this part of the Statute was to shut out the proof of verbal contracts, when from the length of time the witness might fail to remember the precise terms of the agreement.

The danger of fraud and perjury is mainly connected with the proof of that portion of the contract sued upon, and in the language of the Court in the case I am referring to, "if that is not to be performed within the year, in our judgment, no action can be sustained upon the contract or agreement, consistently with a fair interpretation of the Statute; and this, we

“ think, is the only consistent result of the decided cases upon
“ the point.”

In 2 *Parsons on Contracts*, p. 319, it is laid down that when a contract originally within the Statute “ has been entirely executed on one side, and nothing remains but the payment of consideration, this may be recovered notwithstanding the Statute,” and this author cites the case of *Donellan v. Read* in support of this position, and adds :—“ But whether a recovery can be had on the original contract, or only on a *quantum meruit*, is not entirely clear upon the authorities. Upon principle however, we should say that a recovery in such case can be had only upon a *quantum meruit*,” and he cites *Cocking v. Ward*, already referred to. In my opinion this action cannot be maintained upon the special contract, but in view of the decisions to which I have adverted, I think the plaintiff is entitled to retain his verdict under the common counts in his declaration. The case of *Cocking v. Ward* is an authority to this point. There the verdict was a general one for £100 damages. The Court decided on argument that, although the Statute of Frauds precluded the plaintiff from recovering on the special agreement, he was entitled to his verdict on an account stated, of which there was evidence. The case of *McDonald v. McDonald*, James’ Reports, p. 41, established the right, if any doubt could exist on the subject, of a party to recover back money paid under the count for money had and received upon a void contract, and which, in equity and good conscience, the defendant had no right to retain. I think the rule should be discharged.

ROBERTSON ET AL. v. LOVETT ET AL.

Plaintiffs insured a vessel in the office of defendants on October 27th, 1845, by means of the usual application slip, leaving the broker to fill up the policy in the usual way. On the 31st October the Directors of defendants' Company made an entry in their record book in the following words, "Not allowed under the policy to proceed to any port in South Greenland," which they inserted in plaintiffs' policy. The policy was not delivered to plaintiffs till the 1st of June, 1866. The first intimation plaintiffs had of this new condition was a notice served upon them on the 12th June, 1866, after the vessel had sailed to a port in South Greenland. The vessel was lost on the 12th August, 1866, and proof of loss exhibited on the 2nd Sept., 1866. Plaintiffs brought action on the policy on the 27th September, 1872, with added counts for the non-delivery of a policy in accordance with the original contract. Defendants pleaded the Statute of Limitations to these added counts.

Held, that, as the action for breach of contract would have lain if brought after the delivery of the policy in June, 1866, and before the loss, it was barred by the Statute.

YOUNG, C. J., now (February 5th, 1877), delivered the judgment of the Court.

This is an action on the same policy which has been several times before this Court, the plaintiffs having obtained four several verdicts against separate underwriters, and the last, which we are now to review, having introduced a new element in the Statute of Limitations, which we are surprised and regret to see pleaded by insurers against an honest claim. The Court of Queen's Bench lately denounced in strong terms a defence set up by underwriters under the stamp act, which an indignant public opinion forced them to renounce after a decision in their favor, and we would be well pleased were these underwriters at Yarmouth to pursue the same course. The "Rising Dawn," valued at \$21,000, was insured from the time she was built, for a portion of her cost, in the unincorporated Commercial Insurance Company of Yarmouth, in which both the parties to this suit are shareholders, and one of her policies expired on the 25th October, 1865. On the 27th, by the usual slip, countersigned by six of the Directors and by the plaintiffs, the barque was insured in the sum of \$2000 for 12 months at 8 per cent., large insurances having been effected elsewhere, all of which have been paid except this one by the defendant and his associates. The plaintiffs gave a note for the premium, leaving the broker to fill up the policy in the usual way, which remained in his possession. But the Directors, in pursuance, it would seem, of

a previous purpose of which the plaintiffs had no information, on the 31st October made an entry in their record book in the following words: "Not allowed under the policy to proceed to any port in South Greenland," which they inserted in plaintiffs' policy. The first intimation the plaintiffs had of this new condition was a notice served upon them on the 12th June, 1866, after the vessel had sailed from Boston to a port in South Greenland, and, when one of the plaintiffs remonstrated with the broker, he was assured that the clause did not refer to him. It was said at the argument, in vindication of the obstinate and protracted defences in this case, that the broker had died before the last evidence was given, and that there was something in it that was not visible to the eye, but nothing can alter the fact that the policy was materially altered after the risk had been accepted, and the service of the notice of 12th June implies that, if known at all, it was only recently made known to the plaintiffs. The fault the plaintiffs committed was in trusting to any assurances instead of insisting that the clause should be struck out. This they should have done, or reinsured and brought an action for breach of contract. On the 12th of August, 1866, the vessel was lost, and proof was exhibited on the 22nd September, when the claim was resisted, and a long negotiation followed, in the course of which the Directors were instructed, at a meeting of the shareholders duly called, to pay the amount, which they did not do, and, having made an offer to pay half, which the plaintiffs agreed to accept, they withdrew the offer that had come from themselves. Actions were then brought on the policy, which could not be sustained, the Greenland clause being on the face of it, and counts were added, the 5th and 6th of which in this suit are founded on the non-delivery of a policy in accordance with the original contract. In one of these actions, *Robertson et al. v. Dudman*, reported in 1 Russell & Chesley, 50, the Court gave judgment for the plaintiffs, and would have given a like judgment here but for the pleas setting up the Statute of Limitations. And the effect of that Statute and the determination of this suit turn upon a single point. The policy was executed October 25, 1865, and it was delivered to the plaintiffs about the 1st of June, 1866. The damage resulted to

the plaintiffs in the rejection of their claim on the 22nd September, which, if admitted, would have become payable on the 22nd December, 1866. This action was commenced on the 20th September, 1872, and as the Statute required it to be brought within six years next after the cause of action, the question is, when did the right of action accrue? If in October, 1865, or June, 1866, the action was too late. If on the 22nd September, 1866, it is saved by two days. Now, if the action had been brought in October, 1865, after the execution of the policy with the Greenland clause, or in June, 1866, after its delivery but before the loss, it would have lain, but the plaintiffs could have recovered only nominal damages—a point that arises, as we shall see, in some of the decisions. If, again, the action had been brought within six years of the first, or, as I am inclined to think, of the second of these periods, after the rejection of the claim, full damages would have been recovered. But, having been brought on the 20th September, 1872, the Statute applies unless the right of action was suspended till proof of loss on the 22nd September, 1866. I state these propositions the more exactly, because they differ somewhat from the views so ably presented to us at the argument, though the main question is the same.

Now, the leading principle in *Angell on Limitations*, 124, and in *Darby & Bosanquet's Treatise on the Statute*, 24, (both Library Editions), and in all the English cases, including the wheat case of *Battley v. Faulkner*, 3 B. & Ald. 288, is this, that the breach of contract is the cause of action, and that the Statute runs from the time of the breach, and not from any resulting or collateral damages occasioned thereby. From that point of time the Statute begins to run, and when once it begins to run nothing can stop it. The breach of the contract is the gist of the action, and the special damages come in, not as a new or independent cause of action, but merely as a measure of the damages resulting from the original breach. In *Howell v. Young*, 5 B. & Cr., 259, BAYLEY, J., said: "The only question is, what is the cause of action? It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff

"would have been entitled to a verdict for nominal damages." So also *Collinge v. Heywood*, 9 Ad. & Ell., 633; *Hemp v. Garland*, 4 Q. B., 519; *Violet v. Sympson*, 8 El. & Bl., 344.

The rule so firmly established was frankly conceded at the argument, but two cases were relied on, which I have examined with a lively interest, in the hope, I must acknowledge, that they would show some modification applicable to the case in hand. But neither of them will do.

The first of these, *Huntly v. Sanderson*, 1 Cr. & M., 467, was held to be a case of indemnity against the drawing of a bill of exchange by the plaintiff as agent of the defendant. The bill was not accepted, and plaintiff, some years afterwards, was arrested for and had to pay the amount. He might have brought an action for the non-acceptance, when, as defendant's counsel suggested, a jury might perhaps have given him the whole amount to put him in funds to meet the bill, but BAYLEY, B., remarked, "No jury could by law have given him such damages," and counsel rejoined, "The amount of damages not being ascertained is certainly no criterion." The plaintiff brought this action after his arrest, and the Court held that the promise to indemnify was the promise the law would imply, and not the promise to accept, and that the Statute of Limitations, on that account, did not apply.

In the second, *Wilkinson v. Verity*, L. R., 6 C. P., 206, the defendant, in 1859, wrongfully converted plate in charge of Churchwardens, of which they were ignorant till 1870, when there was a demand and refusal, and an action was brought, and it was held that the Statute did not apply. The Court said: "If this had been an action for damages for the conversion of the plate, in which the demand and refusal would have been only evidence of a conversion, the defence upon the Statute must have been sustained. Nor could the ignorance of the plaintiffs or their predecessors have prevented its operation. This, however, is not the present case, in which the plate was originally taken for safe custody, to be restored when required." And the maxim applied: *Qui dolo desit possidere pro possedente damnatur*.

In the *East India Company v. Punt*, 1 L. & E., 48, Lord CAMPBELL, in delivering the judgment of the Privy Council,

after remarking on the extreme hardship to the plaintiff of the defendants' delay in enabling them to plead the Statute, cites *Battley v. Faulkner* and other cases, and proceeds to say that it is the duty of all courts of justice, to take care, for the general good of the community, that hard cases do not make bad law.

In obedience to that wholesome rule, I am obliged to hold that the verdict for the plaintiff in this case cannot be upheld, and that the rule for a new trial must be made absolute.

COCHRAN v. CHIPMAN ET AL.

Plaintiff, as assignee under the Insolvent Act of 1869, brought action to recover \$700 paid within thirty days of the assignment by one Hamilton to defendants, on a judgment entered up at the suit of defendants, shortly before the assignment, but not recorded, because, as one of the defendants said, it would injure Hamilton's credit. The jury found, in answer to questions put to them, that the payment had been made within the thirty days, that Hamilton was then unable to meet his engagements in full, and that defendants had probable reason for believing him to be so unable, and they found for plaintiff without specifying any sum. Objections having been taken to the verdict by rule nisi,

Held, that the distinction of Hamilton in the original writ in evidence, as "of Bedford in the County of Halifax," was evidence of Hamilton's residence being outside of the city, that the oral answers of defendant before a commissioner under an order of the Court were properly received against him as admissions, although the interrogations and prior examinations were not tendered, and that the payment, although made on a judgment, was within the terms of the Act.

In this cause a verdict was found for defendant which was set aside and a new trial granted. The second trial, which took place before WILKINS, J., resulted in a verdict for plaintiff, and a rule nisi to set it aside was granted by the Court on the grounds that the verdict was against law and evidence, for the improper reception and rejection of testimony, and for misdirection.

The action was brought by plaintiff as assignee of the estate of one Hamilton, to recover \$700 alleged to have been paid to the defendant by Hamilton within thirty days of insolvency. The assignment was made on the 19th January, 1872, to plain-

tiff as official assignee, and on February 8th, 1872, the plaintiff was appointed assignee of the estate. The money was paid on a judgment in a suit in which the writ was issued September 18th, 1871, describing Hamilton as "of Bedford in the County of Halifax." A receipt was produced to prove that the payment of \$700 was made on the 27th December, 1871, but a question was raised as to whether the date on the receipt was the 7th or the 27th. The defendant, Chipman, however, testified before a commissioner, that the date of the payment was the 27th, and Ritchie, Q. C., testified that on the former trial the defendant admitted that the payment was made on the 27th.

The jury in answer to questions in writing stated their belief that \$700 had been paid by Hamilton to defendant within thirty days of the execution of his deed of assignment, that he was then unable to meet his engagements in full, and that the defendants had reason so to believe.

Weatherbe, Q. C., in support of rule.—The evidence of Chipman is objectionable. The answers to the interrogations themselves were not tendered, but only answers that were supplemental, and that were taken in connection with his answers to the interrogatories.

Cochran was never appointed assignee as required by the Act of 1869, sec. 31. He himself swears that there was no such power to appoint him. The Insolvent Act requires an assignee to be appointed for each County, and in Halifax the Board of Trade could appoint one for the portion of the County outside of the City. The only proof was that he was acting as assignee. This point did not come up and was not decided in the last argument.

Where is the evidence that the assignee for the city was not the proper person to receive the money? There is no evidence that Hamilton resided outside of the city.

There is no notice given as required by the Provincial Statute, R. S., Chap. 94, Sec. 355, in case of assignment of *choses in action*. The Insolvent Act has not made that unnecessary. The Dominion Statute has not interfered with the matter at all. Even if the Insolvent Act had undertaken to do away with

the notice, it would be *ultra vires*, as the provision does not relate to insolvency.

The payment was made on a judgment, and the Court has decided that if a payment is made on a judgment it does not come within the law as to payments made in contemplation of insolvency.

There is no proof that the payment was made within thirty days.

Rigby, Q. C., contra.—The contention as to appointment is that the appointment is not proven, because all the particulars connected with it are not proven. The appointment was in 1870, and the action was not brought until 1872. The Act provides that after a year the preliminaries to appointment must be presumed; *Insolvent Act of 1869*, Sec. 144. He received his appointment from the Chamber of Commerce and gave a bond. It is contended that the Chamber of Commerce is not the Board of Trade, to which the Act gives the right to appoint. Section 143 of the Act meets that objection.

The original record of appointment as assignee was put in, which is evidence of the appointment as assignee of the creditors. Nothing more could have been done.

He can recover under either Section 89 or 90.

Whether the examination of Chipman could be received or not does not affect the verdict, as we have other evidence to sustain it. *Ritchie's* evidence alone would be sufficient, as to the admission of Chipman, that he received the money on Dec. 27th, as found by the jury. But the examination was properly received; *Secs. 11 and 12 of Chap. 96, R. S.* The section last cited provides for an oral examination, the answers given in which may be put in evidence. Even without the Statute the evidence would be admissible, being the admission of the party under oath. The Statute only gives the means of getting the answers.

All the points raised here were raised on the former argument. The same receipt was put in evidence, showing that the payment was made on a judgment, and the verdict found for defendant was sent back as unsatisfactory. The present finding for plaintiff should therefore be satisfactory.

There is no decision of the Court that a payment on account of a judgment does not come within the terms of the Act as to payments in contemplation of insolvency. If there were, there would be no necessity for the provision as to payments made to a Sheriff under execution.

Chipman says the money was paid on the 27th December, and the receipt is dated the 27th.

Weatherbe, Q. C., in reply.—The complaint of the plaintiff is that he has no evidence. The case was argued before on the assumption that this payment was made on the 7th and not on the 27th. Chipman was resisting the payment to Cochran because he had given no security, and he would be required to pay it again. Chipman's evidence was put in after the failure to supply any evidence to support the case. Why was not the whole evidence put in?

The receipt is clearly December 7. The character taken for a "2" is "r" and there is a full stop before the "7." Mr. Rigby told the jury himself that it was paid on the 7th December. The whole case has been gone over and argued and decided on the assumption that the payment was on the 7th. Chipman swore that, if he wrote that, he wrote it for the 7th. When he swore that it was made on the 27th, he had not the papers or his books before him, and he swore only to a belief; and further, that statement is not in the evidence upon which plaintiffs founded their case, but was put in to contradict him.

B. & L., 492, shows that the plaintiff must prove everything in detail after the plea that plaintiff was not assignee. Cites 31 U. C., Q. B., 279, in support of the contention that money paid on a judgment does not come within the Statute. In that case there was some evidence leading to the conclusion that there was knowledge of the insolvent's inability to meet his obligations.

The verdict here is without any amount and no judgment can be entered on it. (*Rigby, Q. C.*: that is not in the rule.)

The rule is "against law, &c." That covers it. The verdict is such that no judgment can be entered upon it.

MCDONALD, J., now (February 5th, 1877,) delivered the judgment of the Court:—

The plaintiff, assignee of Joseph Hamilton, an insolvent under the Insolvent Act of 1869, sued the defendants for money received for the use of Hamilton before insolvency, for money received for the use of the plaintiff as such assignee, and for money paid by *Hamilton* to the defendants within thirty days before the insolvency, *Hamilton* being at the time unable to meet his engagements in full, and the defendants at the time knowing such inability or having probable cause for believing the same to exist. To this the defendants pleaded that the plaintiff was not such assignee, and also a general denial of the allegations in the last count of the plaintiff's declaration. A verdict was found in favour of the plaintiff, and a rule nisi was taken to set it aside on the grounds of being against law and evidence, improper reception and rejection of evidence, and a misdirection.

It was proved at the trial, by the plaintiff, that he was appointed and had acted as assignee outside of the city, that he received the assignment on the 19th of January, 1872, and that at a meeting of creditors held on the 8th of February, 1872, he was appointed assignee of the estate of the Insolvent. The money in question in this cause was paid on a judgment before then obtained by the defendants in this cause against *Hamilton*; the original writ in which action was produced in evidence, issued on the 18th day of September, 1871, and describing *Hamilton* as "of Bedford in the County of Halifax, Merchant." Therefore the objection that there was no evidence of *Hamilton's* residence being outside of the City of Halifax, is without foundation, as the question is whether or not the plaintiff proved the other material allegations in his declaration; the jury having found them all in his favor.

Whether the evidence is not very clear as to the precise time when the money (\$700) was paid by the insolvent to the defendants. The receipt given at the time was produced, but a question was raised as to whether the date on the face of it was the 7th or 27th of December, 1871. If the 27th, it was within the days before the insolvency, but if the 7th, it was not. The defendant, *Jas. A. Chipman*, was examined at the trial, but his evidence, then given, does not make the matter of that enquiry

much clearer, but he declined to produce his books of account, which ought to have shown the correct date. He testified before a Commissioner that he believed it was on the 27th he received the money, and *Mr. Ritchie* testified that, at a previous trial, he admitted that the 27th was the date of the payment. There was ample evidence on that point to go to the jury and to justify them in finding that enquiry as they did. The defendant, *Mutch*, was not examined nor his absence accounted for.

It was objected at the trial that *Chipman's* oral answers given before the Commissioner, under an order of the Court, should not have been received in evidence, as the interrogatories and prior examination were not tendered at the same time, but I cannot see that this objection is entitled to much weight. It is not necessary to say how far it would be good, if the depositions were taken and tendered in the usual way, on the ground of the inability of the witness to attend and give evidence in Court. It is enough to say that such was not the case, and his answers are evidence against him, as would be any other admissions of his relative to the subject matter of the cause; but it was competent for the defendants to prove all that was said by him at the time of making the admissions to vary or explain the meaning of the words used. (*1 Taylor on Ev.*, 706.) It was contended on behalf of the defendants that, assuming the payments to have been made within the thirty days, there was no evidence that the insolvent was unable at the time to meet his engagements in full, or that the defendants or either of them were aware of the existence of such inability. I think that little need be said upon the question of the insolvent's inability to pay, and it would have been strange if the jury had answered that enquiry otherwise than as they did, but the evidence of the defendant's knowledge of such inability does not appear to me quite so clear. The defendant, *Chipman*, said in his examination before the Commissioners, that he was not aware that *Hamilton* ever told him that he was not able to meet his liabilities in full, but that he always told him he'd pay every honest debt he owed. He says; "he gave me to understand that he had sufficient to pay all honest debts, if he had time." The defendants, however,

a short time before the payment, obtained a judgment against *Hamilton* to bind his real estate, and *Chipman's* impression was that it was not recorded because it would injure his credit. I think that the evidence on that point was properly submitted to the jury, and that there was sufficient to call upon both defendants to disprove their knowledge of *Hamilton's* inability to pay, such knowledge being peculiarly their own, and put directly in issue by the pleading. *Taylor*, in his work on Evidence, page 384, says that, where the subject matter of the allegation is peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of a negative or affirmative character, and even though there be a presumption of law in his favor. Thus, where an action for penalties was brought under the old law for practising as an apothecary without a certificate, as the defendant was peculiarly cognizant of the fact whether he had obtained a certificate or not, the law, which is founded on general convenience, compelled him to produce it. In this case it is not necessary, in upholding the verdict, to go so far as the case cited by *Taylor* went, as, on a review of all the facts and the conduct of the defendants throughout, the question of their knowledge of *Hamilton's* inability to pay, or their having reasonable cause to believe the same, could not properly have been withheld from the jury, and, they having found in favor of the plaintiffs, I think we cannot, on the ground urged, disturb their verdict. It was also objected at the argument that, the money having been paid on a judgment, it was not a voluntary payment, but was protected by law, and the case of *Campbell v. Barrie*, 31 U. C., Q. B., 279, was cited in support of that view. I fail, however, to see the application of that case in favor of the defendant's contention. On the contrary, Mr. Justice WILSON, in his able and elaborate judgement, at page 290, referring to Sec. 90 of the Insolvent Act of 1869, says:—"This section, it will be seen, avoids the payment altogether, if made by a debtor unable to pay his debts, and the creditor knew it, or had reason to believe it, so long as it was made within the thirty days." In this case the jury have found every fact necessary to avoid the payment under that section as alleged in the declaration. Without such a verdict the plain-

tiff could not recover, with it the law entitles him to the money claimed. The objections of misdirection and improper rejection of evidence were not insisted upon at the argument and are without foundation, so that but one more point remains to be considered, namely, that the jury found no particular sum due. That, however, is not a ground taken in the rule *nisi*, and, if it were, the evidence is conclusive as to the amount, and no question of fact with respect to it arose for the consideration of the jury, whose answer must necessarily have been but one, if the question were submitted to them; seven hundred dollars is the amount of the receipt, and the amount admitted by the defendant, *Chipman*, to have been paid by *Hamilton*.

The Court can alter the verdict in order to give it its legal effect. *Ch. Ar. Pr.*, 12 Ed., 462.

I am of opinion that the rule *nisi* must be set aside, and that judgment must be entered for the plaintiff for \$700.00 and costs.

ROBERTSON v. CAMERON.

Plaintiff having proceeded against defendant as an absent debtor, an application was made on behalf of one Willis, claiming to be owner of the property attached, to set aside the proceedings. It appeared that defendant had two others in partnership with him in the business in connection with which the debt arose, one of whom was in the Province at the time the process was issued.

Held that, neither defendant nor either of his partners having moved, there was no one before the Court who could be heard in support of the content on that defendant when sued was not subject to the law authorizing proceedings against absent or absconding debtors.

Affidavit made in Boston purporting to be made before BINGHAM, "Chief Justice of Superior Court," without specifying the Court, held good, where the jurat contained the words, "the Seal of which Court is affixed," and the affidavit bore the seal of the proper Court.

In this case process was issued against the defendant as an absent or absconding debtor, and an application was made to set the process aside, on behalf of one Willis, resident in the United States, who claims to be the owner of the property attached. It was shown on affidavit that the defendant, *Cameron*, was in part-

nership with two others, namely Parker and Shepherd, in the business in connection with which the debt had been contracted. The affidavit on which the attachment was issued was signed "Thomas Robinson," but the defendant's name, as given in the body of the affidavit, was "Thomas Robertson," and on this and other grounds which appear in the argument, objection was taken to the proceedings.

A preliminary objection was taken by *Bligh* on behalf of the plaintiff to the affidavit to set aside the attachment, that it was sworn at Boston and only purported to be taken before BINGHAM, Chief Justice of Superior Court, the contention being that there was nothing to show that the affidavit had not been sworn before the Chief Justice of the Superior Court of Quebec. In the jurat, however, were the words, "the seal of which Court is affixed," and, as the affidavit bore the seal of the proper Court, the objection was over-ruled.

Meagher, in support of rule to set aside attachment.—The defendant never was in the province, and it is sworn and not denied that Parker, his partner, was here when the writ issued and for a fortnight afterwards. Therefore the plaintiff could not proceed against Cameron at all.

As to the affidavit on which the process was issued there would be a great deal of difficulty in indicting Thomas Robertson on that affidavit; 10 East, 83; Tidd, 498 (Lib. Ed.)

Bligh, contra.—As to the affidavit the error is merely clerical. *Ch. Arch.*, 767, 768. In the case in *East* a mistake was made in both syllables of the name. The name was Shakespeare, and the "s" was left out, and therefore the two ways of spelling could not be *idem sonantia*. 2 Taunt., 401; 11 More, 231; 1 Ch. R., 659, note; 2 D. & L., 963; 10 C. B., 72.

This application is made too late. *R. S.*, c. 97, s. 13. It is sworn and not contradicted that six months had expired and expenses had been incurred. The party objecting should appear previous to the expiration of the time within which we were at liberty to assess damages; *Ch. Arch.* 1472, 1474; 8 M. & W. 148; *Ch. Arch.*, 237.

The present applicant has no *locus standi*. He is not a party to the suit. He appears on behalf of Willis, alleging ownership. Ch. Arch. 1472. James Cameron, the defendant, has not made any affidavit at all. Sec. 7 of the Act, cap. 79, allows parties interested to come in on only two grounds; that the sum was not due, or that it was not payable. *James' Rep.*, 347. As to non-joinder, there must be a plea in abatement, but even if that is not required, they have not sufficient facts to put us out of Court, as the two alleged partners are *dormant partners*. *Lindley on Partnership*, 497; *Story on Partnership*, 241.

There is nothing to show that the Sheriff *has not attached* any property of James V. Cameron. If he has attached any of James V. Cameron's property, the proceedings cannot be set aside. Cites *1 B. & Ad.*, 398; *12 M. & W.*, 405.

Meagher in reply.—The presumption as to the affidavit of plaintiff is that Thomas Robinson signed, by mistake, an affidavit prepared for Thomas Robertson.

The judgment of *Bias, J.*, in the cause cited from James' Reports does not go the length contended for. The Statute, Sec. 7, Chap. 97, does not include this case.

If it is to be held that the parties owning property cannot come in to show that the property is not that of the defendant, the result must be, in every case, actions against the Sheriff, which will have the effect of making him very dilatory in executing process.

The debt here is not due in the way plaintiff has taken the proceedings. It is not due by James Cameron to Robertson. James Cameron never was here and never could have held himself out as indebted.

The objection that the irregularity must be taken advantage of at a reasonable time, is based upon a rule of Court. It can not in any case apply to a party who has three years, as in the case of absconding debtor process.

Parker being shown to have been here doing business, no absconding debtor process could lie. All that plaintiff can say as to the partnership, is that he did not inquire as to the other partner. It is not a case of dormant partners at all, for that.

is where one party holds himself out as the only party, there being other parties who lie dormant.

The proceedings should be against the debtor present here, and, while he was present, there could not be process as in the case of an absconding debtor.

WILKINS, J., now (February 5th, 1877,) delivered the judgment of the Court :—

I am of opinion that there is no person before this Court who can be heard in support of the contention, “that the defendant when sued was not subject to our law authorizing proceedings against absent or absconding debtors.” *Willis*, resident in the U. S. of America, on whose behalf this rule is sought to be made absolute, has not only failed to shew that the defendant was not a debtor to the plaintiff when this action was commenced, but the very contrary is shewn by the affidavits of *Willis* and of *Charles E. Cameron*. To advert to the language of Sec. 7 of Chap. 97, Revised Statutes, under which section alone *Willis* could be heard, it appears, from those affidavits, “that the sum demanded by the plaintiff from the defendant was justly due, and was payable by the defendant when the process in question was instituted.” Such are not less facts because *Parker* and *Shepherd* were jointly liable with the defendant. If the defendant were to come before *this Court*, and plead to this suit, or failing that, if the plaintiff were to have recourse to a competent Court in the United States, and were, there, to sue *Cameron*—a subject and resident of and in the Union—for the debt in question, he would in either case under the proved facts, and considering the agency of *Parker* exercised here, recover against *Cameron* and against him alone unless the non-jointer of *Shepherd* and *Parker* were pleaded in abatement, and, if they were made co-defendants, he would recover against the three.

It appears to me, then, that, looking to the provision contained in Sec. 7, (neither the defendant, nor *Shepherd*, nor *Parker* having moved for the rule before us), it follows as a necessary consequence of the facts in proof, that this rule must be discharged.

GRAHAM v. GRAHAM.

Defendant made a promissory note in favor of plaintiff for part of the consideration money mentioned in a deed of certain land from plaintiff and wife to defendant. Plaintiff's witness, McK., proved the making of the note, the signing and sealing of the deed by plaintiff and his wife, and the delivery of it to defendant, and testified further that it was agreed between the parties that the deed was to be left at the house of a certain Justice of the Peace for the purpose of having the plaintiff's wife examined separate and apart from her husband as to her release of her dower, and the fact of such examination and acknowledgment of release of dower certified, and that the note was not to be recoverable until such examination and certificate were made. The wife, it appeared, refused to go before a Justice and acknowledge a release of her dower.

Held, that the delivery of the deed constituted a good consideration for the note, and that no parol evidence of an agreement to vary the terms of the note should have been received.

The defendant's counsel desired, at the close of plaintiff's case, to recall the witness, McK., to examine him as to what he meant when he spoke of the delivery of the deed, having already had the opportunity of cross-examining him upon the point. The Judge who tried the cause declined to allow the witness to be recalled for that purpose.

Held, that it was a matter within the discretion of the Judge, and that he had exercised the discretion wisely.

This was an action brought by the payee to recover the amount of a Promissory note. The defence relied on was contained in the fourth and fifth pleas, the fourth alleging want of consideration, and the fifth setting out that the note was given in part payment of land, and that defendant never received a conveyance of the land. The cause was tried before WILKINS, J., at Pictou, in June, 1874, and a verdict found for plaintiff—a rule to set the verdict aside was taken out under the Statute on the usual grounds, and argued during the December Term, 1875, before three Judges. The three Judges not agreeing, the cause was set down for re-argument, and re-argued December 16th, 1876.

Rigby, Q. C., in support of rule.—The point here is whether there was a delivery in law of the deed of the land for which the note was given. *2 B. & Ald.*, 155; *10 B. & C.*, 729; *L. R.*, 5 *C. P.*, 37. The note was to be paid only after the deed was completed and delivered; the deed was left at a certain place to remain there till plaintiff's wife released her dower; that was never done; therefore there was no consideration for the note. At the trial I was not allowed to cross-examine plaintiff's witness as to what he meant by "delivery" of the deed, nor to examine him upon the same point when called afterwards as my own witness.

In the three cases above cited, to which my attention has been directed since the last argument, the consideration was complete. Here there was an oral agreement at the time of making the note that it was not to be paid till the wife released her dower. *10 C. B., N. S.*, 369 ; *6 El. & B.* 370 ; *1 Cr. M. & R.*, 772 ; *1 Man. & Gr.*, 791. All these cases shew that evidence can be given of a parol agreement to shew when the note was to take effect. *Byles on Bills*, (6 Am. Ed.) 101. The deed here was never delivered as a deed, because defendant did not accept it as such. *3 Wash. Real Prop.*, 257, 267, 368. There was no delivery of the deed here, because defendant professedly took it to leave, at a certain place named by plaintiff. How did plaintiff get the deed to produce at the trial ?

Henry, contra.—The mode in which plaintiff came by the deed has nothing to do with the question here. The title to the land passed at the time. There are only two questions here, first, was the refusal of his Lordship who tried the cause to allow the recalling of the witness mentioned improper, and secondly, was there consideration for the note ? The first was a matter for the discretion of the Judge, and in point of fact there was nothing ambiguous about the evidence of the witness, so that nothing was lost to defendant by the Judge's refusal to recall him. To the second question there can be but one answer ; the title to the land was the consideration for the note, and that title passed. The defendant was entitled to bring his action for specific performance. The cases cited only show that parol evidence can be admitted to explain a written agreement. Here it is sought by parol evidence to contradict the written agreement to pay a certain sum on a certain day. The agreement of which evidence is given, that the note should not be recoverable till the wife released her dower, does not shew want of consideration ; it simply contradicts the written statement in the note. *1 Cr. M. & R.*, 703, 708. The note is independent of the parol agreement, and the only remedy of defendant is to bring his cross-action on the agreement. Cites. *8 Taunt.*, 92 ; *L. R.*, *5 C. P.*, 37.

Rigby, Q. C., in reply —The same principle or discretion

which prevented my examining the witness, *McKay*, would have shut me out from examining the defendant himself, or any witness for defendant. On re-examination by plaintiff's counsel, this witness spoke of delivery of the deed, proving part of defendant's case, on which I did not cross-examine him, waiting to question him about it on the defence.

DESBARRERS, J., now (February 5th, 1877,) delivered the judgment of the Court :

This was an action by the payee against the drawer of a promissory note, dated 13th April, 1871, payable eighteen months after date, to which the defendant, by his fourth plea, pleaded that there never was any value or consideration for the making or payment of the note, and, by his fifth plea, that the plaintiff agreed with him, defendant, to sell to him a certain lot of land, situate at Pictou, and to convey the same to him by a good and sufficient deed, executed by the plaintiff and his wife, with a relinquishment of the dower of the latter therein, for which defendant was to pay \$187; that the deed was accordingly drawn up and dated on the day of the date of the note, and the same was signed and sealed by the plaintiff and his wife, and the promissory note was intended to be in part payment of the consideration, and it was then agreed that the deed should be left with *James Ives*, a Justice of the Peace for the County of Pictou, before whom *Elizabeth Graham*, the plaintiff's wife, was to appear and be examined for the purpose aforesaid, so that the said Justice should give the certificate of the relinquishment of her dower as required by law, and that it was also then agreed that if the said *Elizabeth Graham* appeared before the said Justice or any other Justice to be examined for the purpose aforesaid, and if the deed was delivered to the defendant with the certificate, that then and in such case the promissory note should be paid when due, but not otherwise; that the said *Elizabeth Graham* did not go before the said Justice or any other Justice for the purpose aforesaid, but refused to do so, whereby the deed could not be and has not been delivered to the defendant with the said certificate, and he has not received any conveyance of the land, and there is and there was not any value or con-

sideration for the making, delivery, or payment of the
the defendant. There was also a plea on equitable g
stating that the plaintiff agreed to sell to the defendant
of land in the last plea mentioned, and upon executi
and sufficient deed with a certificate of a Justice of the I
the acknowledgment of his wife, as required by law, a
defendant was then to pay to the plaintiff part of the consi
money, and give him the promissory note declared upon
balance ; that plaintiff and his wife signed and sealed th
and plaintiff fraudulently and wrongfully represented to
dant that his wife objected to making the acknowledgme
that if he, defendant, would pay part of the consideration
and give the promissory note declared upon for the balar
then and in such case the deed would be left with *Jan*
Esq., a Justice of the Peace, and that *Elizabeth Gra*
wife, would go before the said Justice and make the said
ledgment, and that the said Justice would thereupon cer
same as required by law, and the deed with such certificat
then be delivered to the defendant ; that defendant relyi
said false and fraudulent representations of the plainti
the said promissory note in the declaration mentioned ;
Elizabeth Graham has refused to go before said Justice
purpose aforesaid, in consequence of which defendant h
received a deed of the property in accordance with the
the agreement or any value or consideration for the pay
the note. At the trial before Mr. Justice WILKINS a ver
found for the plaintiff for the amount of the note, and
nisi was taken under the statute for setting it aside. I
came up for argument before the Court at the last term
there was a difference of opinion upon the bench rega
it was thought best to order a re-argument, which was
fore the full court at the present term, and as the case h
been reconsidered as well by my learned brethren as m
is now to be disposed of. I think it proper to say tha
careful reconsideration of this case, my mind has unde
change. I at first thought that the verdict ought to be se
my opinion now is that it ought not to be disturbed. The
relied upon by the defendant's counsel for setting aside the

were these,—First, that there was no consideration for the note declared upon, as no deed of the land, for the price of which it was given, was delivered to the defendant by the plaintiff with the relinquishment of his wife's dower therein before a magistrate in conformity with the agreement made between them when the note was given,—Second, the improper rejection of the evidence of *William J. McKay* tendered on the part of the defendant at the close of the plaintiff's case to explain a material part of his evidence given, while under a cross-examination as a witness called by plaintiff at the trial. Looking at the evidence of this witness, who was the only one called, and upon whose evidence the case entirely rests, it appears to me that so far from shewing a want of consideration, it shews indisputably that there was a good and valid consideration for the making of the note, which was given contemporaneously with the execution and delivery of the deed by the plaintiff to the defendant of the land. The witness, after proving the making of the note, repeated that he saw the note signed by defendant and delivered to the plaintiff in part payment for the land, \$40 being paid at the the time, and the balance due secured by their note. He says it was agreed that the note *was not to be recoverable* until *Mrs. Graham* should go before a magistrate and relinquish her dower; and the deed for this purpose was to be *left by defendant at the house of James Ives, a magistrate* at Pictou town. The deed, he says, was executed in his presence by the plaintiff and his wife, and he, the witness, saw it at *Ives'* house after that. He adds that the plaintiff told him sometime after his wife had not relinquished her dower; the consideration was for \$187. On the deed being exhibited to the witness he identified it *as the deed executed in his presense and delivered to the defendant at the same time the note was delivered to the plaintiff*.—By the delivery of this deed all the title which the plaintiff had in the land passed from him to the defendant, and that I think was a sufficient consideration for the making of the note, the payment of which cannot be resisted because the plaintiff's wife has failed or refused to relinquish her dower in the land. For the violation of that agreement, if such were made, the defendant may have a right of action against the plaintiff on the agreement it-

self, but the breach of it cannot be insisted upon as a ground of defence in an action on the note by which the defendant promises to pay to the plaintiff a sum named, without any qualification or condition whatever, within a specified time. The evidence given by the witness *McKay* to the effect that the note was not to be recoverable until the plaintiff's wife should go before a magistrate and relinquish her dower, which was taken subject to objection, was inadmissible, as it is a clear and well-known principle of law that no oral evidence can be received to vary or contradict a written instrument, which must speak for itself. In *Moseley v. Hanford, &c.*, 10 B. & C., 729, an action against the maker of a note payable to the bankrupt on demand for a balance due him on the purchase of land, in which evidence was received to shew that, at the time the note was given, it was expressly stipulated that it was to be paid on the bankrupt's delivering up possession and accounting for rent, it was held on motion for a new trial, a verdict having been found for plaintiff, that no evidence of such a stipulation ought to have been received, on the ground that the evidence of an agreement that the note was not to be put in suit until a given event happened was not admissible, the effect of it being to contradict by parol the note itself, and the rule was refused. In *Spiller vs. Westlake*, 2 B. & Adol., 155, which was also an action by payee against the maker of a promissory note, it was contended on the part of the defendant that there was no consideration for the note, inasmuch as the money for which it was drawn was by agreement to be paid in consideration of the plaintiffs' executing a conveyance of a certain estate, which they had not done. This was held to be no defence to the action. Lord TENTERDEN, C. J., then said; "Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute a conveyance; but here the vendee, by a distinct instrument, agreed to pay part of the purchase money on a certain day; I am not

"no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited the current acts were stipulated for in the same instrument, here the payment of the money, (which was part only of the purchase money,) was separately provided for,"—as was done in the present case. In *Abrey v. Cruz*, L. R., 5 C. P., 37, which was an action by the payee against the drawer of a bill of exchange, payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him, that at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor, that the acceptor should deposit with the plaintiff certain securities to be held by the plaintiff as security for the due payment of the bill, and that in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold, but still held them. Held, WILLES, J., doubting, that the oral evidence of the agreement alleged in the plea was not admissible; inasmuch as it contradicted or varied the express written contract on the face of the bill.

In *Foster v. Jolly*, 1 C. M. & R., 703, where the note sued for was made payable fourteen days after date, it was held that parol evidence could not be given to shew it was not to be paid in case a verdict was obtained in an action brought between other parties. Lord ABINGER in that case says; "The maker of a note payable on a day certain, cannot be allowed to say to the payee; 'I only meant to pay you on a contingency' that is at variance with his own written contract,"—and yet that is precisely the language which the defendant is addressing to the plaintiff here. The case of *Davis v. Jones*, 17 C. B., 625, seems, at first sight, to lay down a different principle. There it was held

that parol evidence was admissible to shew that a written contract which had no date, was not intended to operate from its delivery, but from a future uncertain period. On careful examination, however, it will be found that it was not intended to controvert the principle laid down in the cases referred to, for JERVIS, C. J., speaking of the agreement entered into in that case, says: "the instrument contains a certain portion of the terms of the holding, and so far parol evidence is not admissible to vary or control it." In *Pym v. Campbell*, 6 E. & B., 370; a later case, ERLE, J., says, "that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." In *Moseley v. Hanford*, 10 B. & C., 729, an action against the maker of a promissory note, which, on the face of it was made payable on demand, oral evidence of an agreement entered into when it was made that it should not be paid until a given event was held to be inadmissible. See also 3 *Camp.*, 57, and 3 *Taunt.*, 92. If, then, no oral evidence is admissible to change the nature and character of the note sued for, there can be no ground for disturbing the verdict, for the conveyance of the land to defendant was a good consideration.

As to the second ground of objection to the verdict, but little need be said. The witness, *McKay*, who was called by the plaintiff to prove the making of the note on which this suit was brought, stated, on his cross-examination, that the deed from the plaintiff was executed in his presence and delivered to the defendant, and at the close of the plaintiff's case he was recalled on the part of the defendant with the view of being again examined, touching the execution of the deed and especially to ask what he meant by the execution of the deed. The plaintiff's counsel objected to the re-examination of the witness on that subject, as he had already been cross-examined on the very point, and the learned Judge refused to permit him to speak again on that subject, considering the proposed examination under the circumstances very objectionable. The witness might well have been asked, when under cross-examination, what he meant by what he said touching the execution of the deed, but the Counsel did not do so, and for this reason I think the learned

Judge exercised a proper discretion in refusing to permit him to be examined a second time on the same subject. That it was in the discretion of the Judge either to permit or refuse to allow the witness to be re-examined, there can be no doubt. In *Adams v. Bankart*, 1 C. M. & R., 681, the plaintiff's counsel proposed to recall a witness for the purpose of ascertaining the exact evidence he had given on a particular point. TAUNTON, J., had said at the trial that he could not allow a witness, after it had been seen "where the shoe pinched," to be re-examined without the consent of the opposing party, and in this he was sustained by the whole Court, Lord ABINGER, C. B., remarking, "It is quite clear, that it is merely matter of discretion." Such refusal is therefore no ground for setting aside the verdict in this case. The defendant might have been called as a witness for himself to contradict the statement of *McKay* as to the execution and delivery of the deed to himself, if it was untrue, but as he was not called to speak of a matter that must have been within his knowledge, the inference to be drawn from that fact is that he could not contradict his statement. I am of opinion that the verdict for the plaintiff in this case ought to be sustained, and that the rule nisi for setting it aside ought to be discharged.

BOWMANVILLE MACHINE CO. v. DEMPSTER.

Defendant bought goods belonging to plaintiffs from A. B. A. their agent, A. B. A. being indebted to defendant at the time; defendant testified that A. B. A. did not disclose at the time of sale, that the goods were not his own; A. B. A. and his book-keeper testified that the principals were disclosed at the time the goods were ordered, and produced a memorandum headed with plaintiffs' name, containing the order signed by defendant, but declined to produce their books. Defendant denied that plaintiffs' name was on the memorandum, when signed by him. The jury found for defendant for \$75, the excess of his offset. The \$75 was subsequently remitted by defendant.

Held, that the verdict could not be disturbed.

This action was tried before Mr. Justice DESBARRES, at Halifax, in April, 1876, when a verdict was found for defendant for \$75.

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The following statement of facts and evidence is extracted from Mr. Justice DESBARRES' charge to the jury, as reported in his minutes of the trial.

The plaintiffs, who were carrying on business as manufacturers of machinery in Canada, brought this suit to recover from the defendant the sum of \$400 (less a credit of \$150) for goods bargained and sold to him, on which they alleged that sum was to be paid to them on the arrival of the goods in Halifax, and the balance four months after delivery. The defence set up was that one Alexander B. Almour had sold and delivered the goods to the defendant in his own name and as his own goods, with the consent of the plaintiffs, and that at the time of such sale and delivery the defendant believed Almour to be the principal, and did not know that the plaintiffs were the owners of the goods or interested in the sale and disposal of them, or that Almour was their agent, and that, before the defendant knew the plaintiffs were the owners of the goods or that Almour was an agent in the sale thereof, he, Almour, became, and at the time of the commencement of this suit was and still is, indebted to defendant in an amount greater than plaintiffs' claim, on a promissory note for \$325, and for money paid, &c., which amount the defendant was willing to set off against the plaintiffs' claim. The question therefore was:—Whether Almour in this transaction was acting for himself as principal or as agent of the plaintiffs, and, if as agent, whether the defendant knew or had the means of knowing the fact.—Almour, who was called as a witness for plaintiffs, stated that he began to do business with the plaintiffs three or four years ago and had been doing business for them ever since; that defendant spoke to him for the machinery three or four months before the order was filled, and it was expressly understood between them that the machine was to come from the Bowmanville Machine Co.; that he was present when defendant signed the order for the goods, which was then headed "Bowmanville Machine Co.," and the goods thus ordered came from the plaintiffs and were received by defendant. Dyce Cutlip, the book-keeper of Almour, another witness on the part of the plaintiffs, said he was present in March, 1875, at a conversation between defendant and Almour in reference to ordering a Planing Machine, on

which occasion the defendant was shown the price list of Plaintiffs' Company and requested Almour to order a Planing Machine, the particulars of which he entered in the order book; that the order given and signed by defendant was entered in that book, and it was then in the same state as when defendant signed it. Upon this evidence the plaintiffs rested their case, and defendant, being called as a witness on his own behalf, stated that he bought from Almour the goods sued for and did not know that he was acting as agent of any other person and dealt with him alone; that Almour never told him he was selling the goods of any other person, and he agreed to purchase the machine from him; that when he signed the order for the Machine, the words "Bowmanville Machine Co.," "James Dempster," and the figures "\$400 cash on arrival Halifax, balance 4 months" at the heading of the order, were not in it. Of that, he said, he was positive, and that the terms were not settled upon at the time he signed the order—that the reason he bought the machine from Almour was because he had sold him an engine for \$325, for which Almour gave him his note; that this note was not paid at maturity and still remained unpaid. He denied ever having seen a price list of the Bowmanville Machine Co., and did not know whether the date was written on the order, but there was no writing above the red line when he signed it.

A rule was taken out under the statute to set the verdict aside on the usual grounds, and argued before four Judges, January 6th, 1877. The \$75 given by the verdict in favor of defendant, being the amount of the excess of his offset against Almour, plaintiffs' agent, over plaintiffs' claim, was in the meantime remitted by defendant's attorney.

Bligh, in support of rule.—The jury in this case was evidently not disposed to do justice to the plaintiffs. The verdict they found, giving the defendant \$75 against plaintiffs' company, on account of Almour's indebtedness to defendant, shews that.

Cites *Bullen & Leake*, 808. At common law you could not offset debts; statutes were passed giving the right to do so, when the debts were between the same parties. The principal case, showing how far the principle of offset can be car-

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ried, in respect to agents, is *George v. Clagett*, 7 T. R., 359; 2 Sm. L. C. (6 ed.), 113; 2 B. & Ad., 157; 5 B. & Ad., 393.—The debts set off must be contemporaneous with the dealings with the agent; 4 C. B., N. S., 715, where Mr. Justice WILLIAMS asked counsel during the argument if there were any cases to shew that debts previously contracted by the agent could be set off, and no answer was given. The answer is clear; there are no such cases. The cases above cited shew that there is nothing to prevent the bringing of this action; 1 East 335; 18 C. B., N. S., 467, 477.

McCoy, Q. C., contra.—The agent here is attempting to avoid payment of his debt to defendant. As soon as defendant found out that Almour's credit was not good he bought the machine, the price of which is in suit, before the note representing Almour's debt was due. The first bill rendered by Almour to Dempster for this machine ran in Almour's own name, without mentioning the word "agent," and the second merely contained the word "agent" after Almour's name. He wrote several letters about the same matter in his own name, as if he were principal. It is in evidence that Almour was in the habit of buying goods on his own account to fill orders, and that the knives, part of the machine whose price is here sued for by these plaintiffs, were bought by Almour from other parties. Almour refused to produce his books, which raises a presumption against the plaintiffs; *Broom's Leg. Max.*, 937.

(YOUNG, C. J. We need no authority for that.)

The debt here set off was not due till after the sale of the machine; 18 C. B., N. S., 467. Under our statute, R. S., Ch. 94, Sec. 175, defendant can plead as set-off any debt accruing before action brought, and if he proves a set-off greater than plaintiff's claim, he can get a verdict for the difference. Here the jury gave defendant a verdict for seventy-five dollars, which he has remitted, as it was competent and proper for him to do, being a plaintiff as respects his set-off, and there being no reason why these plaintiffs should pay him \$75, Almour's debt. *Ch. Arch.*, 1517. A plea of set-off is to be taken distributively; *Bullen & Leake*, 683.

Bligh, in reply.—We come here to set aside a verdict for defendant for \$75. The *remittitur* was not filed till after the rule *nisi* was taken out. The defendant proves that he knew Almour had to send away to some company for the machine, and that he has seen Almour stamping goods in his shop with his name as agent. Very little is required by the Courts to put it upon the defendant to inquire into the agent's relations; *1 East*, 335, already cited. The charge that Almour is seeking to get rid of this debt of \$325 to Dempster might be an argument to a jury, but has no pertinence here. There is no evidence that this machine was ever in Almour's possession, which was necessary in order to remove from defendant the presumption of knowledge of his agency; *7 C. B.*, 693. In *2 B. & Ad.*, 137, already cited, the same principle is laid down. At least the circumstances should have put the defendant upon his guard and upon inquiry. *Story on Agency*, Sec. 401.

SMITH, J., now (February 5th., 1877,) delivered the judgment of the Court :

The plaintiffs in this action are carrying on business as manufacturers of machinery at Bowmanville, in Canada, under the style and firm of the *Bowmanville Machine Company*, and have brought this action against the defendant, *Dempster*, to recover from him the sum of \$400, for goods sold and delivered. That articles such as plaintiffs alleged to have been delivered, did actually come into the possession of, and were purchased by, defendant, there is no dispute. The only question involved in the case is, from whom were they purchased? in other words, with whom did the defendant make the contract? The defendant alleges that he did not know the plaintiffs in the transaction; that he contracted with, and bought the articles from, one *Alexander B. Almour* at Halifax, who, he was not aware, was acting as agent of the plaintiffs. He likewise pleads a set-off of \$325 due him from the said *Almour*. The jury found for the defendant for the sum of \$75. Of course this verdict so rendered could not be sustained, which subsequently was admitted by defendant filing a *remittitur* of the sum so found.

The principles which govern the right to set off a debt due from a factor against a claim for the price of goods by his principal, are well defined in a number of English cases, and WILLES, J., in delivering judgment in *Semenza v. Brinsley*, 18 C. B., N. S., 467, perspicuously refers to them : "To make a valid defence," he says, "within the rule, it is obvious that the plea should shew that the contract was made by a person whom the plaintiffs had entrusted with the possession of the goods ; that that person sold them as his own goods in his own name as principal with the authority of the plaintiffs ; that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undeceived in that respect the set off accrued." In *Fish v. Kempton*, 7 C. B., 687, WILDE, C. J., said : "In all cases of set off the law endeavors to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller." This is too clearly and sound law to require numerous cases to be cited in support of it. Our enquiry, as I apprehend, in this case is simply whether the defendant has, by his evidence, brought himself within the operation of these principles. If his testimony is to be believed, and the Jury have chosen to believe it, when taken in connection with some peculiar features of this case, I am of opinion that he has. He testifies that : "I bought from *Almour* the goods sued for. I did not know that he was acting as the agent of any other person. I dealt with him alone. *Almour* had frequent conversations with me about buying a planing machine from him. Never told me he was selling the goods of any other person. I agreed to purchase the machine from him when I signed the order for the machine in this book marked '2.'" He also states : "I bought the machine from *Almour* that I might set off note against price

of the machine, and I would not have bought the machine if *Almour* had not been indebted to me." And again he adds : " I saw machinery in *Almour's* place of business when I went there, which I presumed belonged to him." An account was also put in evidence, rendered by *Almour* to defendant, in which defendant is made his debtor for the price of these goods, and a credit given of \$150. If the testimony thus furnished by the defendant were uncontradicted, I think it could hardly be contended that the plaintiffs could recover ; but the account given of the purchase of the articles in question by him is disputed and contradicted by *Almour* and the witness, *Cullip*, his clerk. In support of their version of the contract, that the defendant dealt with *Almour* as the disclosed agent of the plaintiffs, a very important piece of evidence was given from the order book, which was admitted to have been signed by the defendant. It reads thus :

" HALIFAX, N. S., 13th March, 1875.

ORDERED FOR BOWMANVILLE MACHINE COMPANY.

From James Dempster.

Terms—\$400 cash on arrival Halifax, balance 4 months."

A red line here divides these entries from the list of articles ordered, and defendant's signature is appended. The defendant positively denies that the words above the red line, viz : " Bowmanville Machine Company—James Dempster—\$400 cash on arrival Halifax, balance 4 months," were present when he signed said order. But for this denial the case would have been conclusive to my mind against the defendant. If there was nothing further to assist the minds of a jury in deciding as to the accuracy of these conflicting statements, it is possible, on the ground of the preponderance of evidence, they might have hesitated in finding the verdict they did, but in view of the somewhat peculiar nature of the entry above the red line, certainly somewhat inexplicable, and of the refusal of *Almour* to produce his books at the trial, which, as testified to by his clerk would shew an entry of the machine, the subject of the suit, I am far from saying that the jury did not legitimately discharge their functions. Such a refusal was calculated to excite, and, indeed, must have awakened grave doubts, if not serious sus-

pitions in their minds as to the correctness of the version given of the contract by *Almour*. I have already referred to the sum of \$75 given for the defendant as untenable, but I think the defendant had a right under the pleadings, which he exercised, of curing that defect in the verdict by entering a *remittitur* for the amount.

I could not avoid remarking at the argument that it was somewhat surprising that the plaintiffs themselves, with whom peculiarly the nature of the agency of *Almour*, if such existed, was known, had not been examined. It would have been of the utmost importance for them to shew, if they could have done so, that *Almour* never sold their goods in his own name as principal, or that they had never placed him in the position to enable him to mislead the public. In the absence of such proof in connection with certain portions of their correspondence in evidence, I think the jury were justified in arriving at a conclusion that they concurred in the acts of *Almour*. The rule to set aside the verdict must be discharged.

MURDOCH v. DEWOLF ET AL.

Where three stamps were affixed to a note, the three making up the amount of stamp duty payable upon it, and the figures "5-16-73" corresponding with the date of the note were written across the three stamps (which were affixed one above another, the middle overlapping the lower one) so that a small portion of the figure "5," and nothing more, could be discerned upon the lower stamp.

Held, that the stamps were sufficiently cancelled.

This action was brought by plaintiffs to recover the amount of a promissory note made by W. Fraser & Sons in favor of the defendants, endorsed to the plaintiffs, and dishonored. Plea, among others, that the note was not duly stamped and the stamps not duly cancelled. The cause was tried before WILKINS, J., in May, 1876, and a verdict found for plaintiffs. A rule nisi was granted to set aside the verdict on the grounds that it was contra-

to law and evidence, and the charge of the learned Judge, and for the improper reception of evidence. This rule was argued before Sir WM. YOUNG, C. J., DESBARRES, WILKINS, and SMITH, J. J., in December, 1876.

The sole question raised on the argument was as to the stamping. Three stamps covering the requisite amount had originally been affixed to the note, which were cancelled by writing on them the figures 5—16—73, the date of the note being May 16, 1873; the stamps overlapped each other and it did not clearly appear that any portion of the figures was on the third stamp.

The Judge told the jury that he thought the stamping so defective that the note, in the language of the statute, was not available. The jury after giving their verdict for the plaintiff stated in answer to questions by the Judge, that they found that the note was duly stamped.

Graham, in support of the rule—Cites the stamp act, 1867. It is not sufficient to have the date written once, running across all the stamps. Each of the stamps should bear the date. There is nothing on the lower stamp to identify it with the note. It could be used again, which it is the object of cancellation to prevent.

In *Troop v. Troop* the stamps had dropped off and the note was held not to be duly stamped. Cites 29 U. C., Q. B., 35.

[WILKINS, J. Does the stamping as done here negative any intention of fraud on the revenue?] The question is not that, but whether the statute has been complied with. If stamps can be obliterated as these are, there is nothing to prevent the revenue from being defrauded.

Ritchie, Q. C., contra.—There is no intention here to defraud the revenue. The lower stamp was under the middle one and placed on obviously before it.

Even the date in full would not prevent the use of the stamps again, as the stamps could be held over and used another year.

The finding of the jury is in effect that one of the figures written on the second stamp extended to the lower stamp, the stamp in question. 30 L. T., N. S., 453; 31 id., 372.

Graham, in reply.—If the Judge had asked the jury whether the cancellation extended to the lower stamp, the finding would be of importance. They could not find a question of law.

DESBARRES, J., now (February 5th, 1877), delivered the judgment of the Court :

This was an action on a promissory note for \$500, dated 16th May, 1873, drawn by Wm. Fraser & Sons, payable to the defendants, and by them indorsed to the plaintiff. At the trial a verdict was found for the plaintiff for the amount of note and interest, and, a rule having been granted to set it aside, the case came up for argument before the full Court on a single point, viz. ; that the stamps appearing on the face of the note were not obliterated as required by Chap. 9 of the Dominion Acts of 1867. There are three adhesive stamps appearing on the face of the note for the full amount of duty payable thereon, and over and across the two upper stamps are the figures "5, 16, 73." the lower part of the figure "5" extending a little over and upon the lower or first stamp, which is partly covered by the second, indicating and corresponding with the date of the note. The figures over the two upper stamps are plainly written and although the extension of the lower part of the figure "5" over the first stamp is not so distinct, yet it will be found, on close inspection, to extend a little over the first stamp, thereby evidently showing that when made the figures were intended to extend over the surface of all the stamps. The figure "5" though written on the second stamp, may in point of fact be considered as wholly covering the first, as that part of the second on which it is made, lies directly over the first stamp. Now the object of the legislature in requiring stamps to be obliterated was to prevent the possibility of them being used a second time for any other instrument. Without such a requirement the Stamp Acts would have been inoperative. It was therefore a wise and indispensable provision, but I do not think it was ever intended to apply to a case like this, where the stamps, from the marks and figures upon them, could never again have been used. There certainly is nothing connected with the affixing and

obliteration of the stamps upon this note to show, or from which it could be inferred, that there was any intention on the part of the makers to evade the payment of the duty, for the note, as I have already remarked, was stamped for the full amount of the duty payable thereon, and if the whole of the figure "5" had been written over the first stamp, instead of the lower part of it only, I presume no objection would ever have been raised for want of a proper obliteration. If such an objection as this on the part of the defendants, who have received full value from the plaintiff for the note, be held sufficient to invalidate it, the law would operate as a trap to victimize honest men, and it would be better to abolish the stamp acts altogether than that such a result should be produced by them. My impression is that the note was properly stamped and that the stamps were properly obliterated. I therefore think the jury were warranted upon the evidence before them in finding a verdict for the plaintiff, and that the rule *nisi* for setting it aside must be discharged with costs.

HARRINGTON v. REYNOLDS.

Plaintiff, acting as agent for patentees, under an agreement that he was to have for his services in promoting the sale of the patented article one-fourth of the royalties or profits, made an agreement with defendant, reciting that plaintiff had received from patentees one-fourth interest in the patents, and professing to assign one-half of that one-fourth interest in the patents to defendant.

- Held*, that plaintiff, not having the interest in the patents which he professed to sell to defendant, was not entitled to recover from him the unpaid consideration money.

This cause was argued before three Judges in the July Term, 1875, and the opinions of the Judges upon it were delivered in August, 1875, and reported in vol. 1, p. 134. As there was a difference of opinion between the Judges who heard the argument, Sir W. YOUNG, C. J., and DESBARRES and WILKINS, J. J., the cause was ordered to be re-argued, and was accord-

ingly re-argued January 11th, 1877, before five Judges, Sir William YOUNG, C. J., and DESBARRES, WILKINS, McDONALD, and SMITH, J J.

Meagher, in support of rule.—In addition to the arguments used on the former hearing, contends that all the right Harrington has is that of an agent, not assignable or transferrable; *Benjamin on Sales*, 517 to 520, and cases there cited. When Reynolds made the contract with Harrington, he thought he was buying a fourth interest in the patent, on the representation set out in the paper drawn up by Harrington. There is no proof that Reynolds was aware what he was buying, which was merely a remote interest in royalties, worth little or nothing. The case cited on the trial from *5 M. & W.*, 619, is really in our favor.

C. S. Harrington, contra.—The evidence, as contained in the written agreement, shews that the plaintiff undertook to sell, not half of a fourth interest in the patent, but of *his* interest.

YOUNG, C. J.—You must look at the recital in that agreement, which states that the plaintiff had a fourth interest in the patent. If defendant saw the paper giving Harrington his interest, you are all right.

Harrington.—The defendant carried out the agreement by paying part of the money in several instalments, finding no fault with his bargain. See *Mitchell v. Newhall*, 15 M. & W., 308. There the plaintiff, a broker, instructed to purchase certain shares, purchased, not shares, but a letter of allotment, and it was held to be a matter for the jury to decide what were the instructions given to the broker. It is immaterial whether the interest of the plaintiff was worth a cent or not if the defendant purchased what he thought he was purchasing. Might not the jury infer from the silence of the defendant, that he could not say he had been deceived, or had not seen the first paper?

WILKINS, J.—Is it not to be assumed on the face of the two papers, that the defendant saw both?

Harrington —That is my contention. With regard to plaintiff's interest, I contend that the instant plaintiff performed any personal service in connection with the patent, he acquired an interest in it; *L. R.*, 2 *Exch.*, 311; 1 *Bosanquet & Puller*,

268. There is, in fact, no plea on the record alleging that the defendant purchased something he did not know he was purchasing. You are asked to assume that the defendant was deceived without a word of evidence. It is the royalties, in which plaintiff had a fourth interest, that constitute the value of a patent; *L. R.*, 3 *Q. B.*, 197.

Meagher, in reply.—In *Mitchell v. Newhall*, cited, there was no written agreement, as there is here, to shew the jury what the agreement was. In the case cited from 1 *B. & P.*, 262, the one party paid the other for the use of the patent and had the use of it. In 15 *M. & W.*, 308, the very article bargained for was sold. There is no proof that royalties have been earned, and even if there were, Reynolds would have no recourse against the patentees for his share of them. The recital in the agreement with defendant is evidently false. *Sugden on Vendors*, 398.

MCDONALD, J., now (February 5th, 1877,) delivered the judgment of the court :

This cause was first argued before their Lordships the CHIEF JUSTICE, Mr. Justice DESBARRES and Mr. Justice WILKINS, whose judgments, with the two agreements in evidence, are reported in 1 *R. & C.*, 134 ; and there being then a difference of opinion on the Bench, the case came before the full Court this term.

The plaintiff who instituted this action, *Mr. Harrington*, now deceased, claimed to have received an interest in a Patent for "Improvement in Car-couplings," under an agreement entered into between him and the patentees, whereby he was authorized as the agent of the Patentees to make proposals or offers to any party or parties to bring the said patents into use, and for his services as such agent he was to have received, (not any share in that out of which the profits were expected to be made but) one-fourth of the royalties or profits. If under this agreement *Mr. Harrington* had fulfilled his part of it, and any profit had been made, it is, I think, clear that his remedy against the patentees would have been to recover his share of such profits only. He received no interest in the thing out of which the

profits were to have been made, any more than a salesman receives a share of the goods which he undertakes to dispose of for the owner under an agreement to be paid for his services by a proportion of the profits of such sale. It does not appear that any profit was actually made before the agreement with the defendant, and, if there were, it was not his interest in such profits that *Mr. Harrington* undertook to transfer to the defendant — In the preamble of the agreement between them it is recited that the patentees “ have disposed of one-fourth interest in the Canada and one-fourth interest in the United States patents to the said A. Inglis Harrington,” which preamble however is not, as I think, correct, though *Mr. Harrington* might have honestly thought it was. In consideration of a sum of money, part of which is now sought to be recovered, he undertook to sell one-half of that interest, that is, one-half of one-fourth *in the patents* to the defendant. That which he bargained to receive is not what he undertook to sell, and *Reynolds* could not have enforced his agreement with *Harrington* against the patentees, because they did not authorize *Harrington* to enter into the agreement which he made with the defendant, and if *Reynolds* had ever so faithfully acted under his agreement and caused even large profits to be made by the sale of the patents, I fail to see how, under this agreement with *Harrington*, he could have recovered any part of the profits in an action against the patentees. The defendant did not receive what he bargained for, because *Mr. Harrington* had it not himself, and in that way this case appears to me distinguishable from some that were cited at the argument. I think the rule must be made absolute for a new trial.

YOUNG, C. J., and DESBARRES and SMITH, J J., concurred in the opinion of Mr. Justice McDONALD.

WILKINS, J., said he adhered to the opinion expressed by him on the occasion of the former argument, reported in vol. 1, p. 142.

COGSWELL v. O'CONNOR.

Defendant bought of one B. his equity of redemption in a portion of certain land subject to a mortgage to plaintiff, and delivered to Mr. T., a solicitor, a mortgage of the same to plaintiff, to be held as an escrow until the lands should be released from the plaintiff's first mortgage. The mortgage made by defendant came into the possession of plaintiff's solicitor by some means, although the condition as to the release of the land from the first mortgage to plaintiff was never fulfilled, the land having in fact been sold under foreclosure of the first mortgage. Plaintiff brought action upon the covenants in defendant's mortgage and upon the accompanying bond.

The Court were equally divided upon the question of non-suit.

YOUNG, C. J., and WILKINS, J., were for setting aside the non-suit, holding that under the above circumstances, there was such a presumption of the delivery of the mortgage and bond as to sustain his action.

MCDONALD and SMITH, J. J., contra.

This was an action on the covenant to pay in a mortgage, with a count on the bond given with the mortgage, for balance due after foreclosure and sale of the mortgaged property. Defendant pleaded, *inter alia*, that the documents were delivered as escrows, to be kept till defendant's wife signed the mortgage, also that they were to be kept as escrows until plaintiff executed releases of certain mortgages, i. e., the mortgages on the same property previously foreclosed. The cause was tried before Mr. Justice McDONALD, who directed a non-suit. The rule *nisi* to set aside the non-suit was argued before four judges, January 13th, 1877.

B. G. Gray, in support of the rule—The main point here is the delivery of the mortgage and bond. Mr. Thompson was called and proved the handwriting of defendant on the documents. We produced the papers, and stopped. We offered the evidence which the law requires to raise a *prima facie* presumption of delivery. That was not rebutted.

Mr. Thompson, on his cross-examination, spoke of several negotiations respecting the transaction, but they fell through, and we produced the documents. There was *prima facie* evidence of delivery which should have gone to the jury; 2 *Greenleaf on Evid.*, 314, and the cases there cited; 3 *Washburne on Real Property*, 294, citing 7 *Taunt.*, 251. Signing and sealing is evidence of delivery to go to a jury. 1 *Taylor on Evidence*, 144; 2 *Broom's Com.*, 393; *Peakes' Rep.*, 146,

cited in *Fisher's Dig.* 2984. As to the escrow, cites *Murray v. Stairs*, 3 Dowl. & Ryan, 278 ; 3 *Wash., R. P.*, 298.

MCDONALD, J.—The defendant got no consideration for this mortgage. You have sold the land under the previous mortgage, and defendant has an equitable plea setting up those facts.

YOUNG, C. J.—The mortgage is out of the question ; the inquiry is whether by his bond he made himself personally liable for the balance claimed.

Bligh (with whom was Weatherbe, Q. C.), contra.—As to the escrow, it is not necessary to say “ I deliver this as an escrow ” to make it such ; 8 *Exch.* 290, 17 *C. B.*, 634.

Weatherbe, Q. C., rises to make a remark.

Rigby, Q. C., objects that Mr. Weatherbe has no right to interfere while his colleague, Mr. Bligh, is addressing the Court.

Weatherbe, Q. C., contends he has the right to take up part of his colleague's time.

The COURT.—It has been decided over and over again, that you have no such right.

Bligh.—Cites 11 *M. & W.*, 147, qualifying the doctrine laid down in *Sheppard's Touchstone*, 58,59 ; *L. R.*, 2 *H. of L. C.*, 323. In 5 *Hurlst., M. & W.*, 797; the judge, after the argument, said he thought he ought to have non-suited the plaintiff on the same principle for which we contend here. In *L. R.*, 20 *E. C.*, 262, it is held that delivery to the solicitor of the grantee will not convert the document from an escrow into a deed, if the circumstances of the case shew that the execution was conditional. When defendant signed the bond he intended to sign a bond accompanying a mortgage to be signed by his wife.

Weatherbe, Q. C.—It is admitted that, if the document was signed on the condition that the wife was to sign it, and that was not done, it cannot be upheld as a deed. But the Court is asked to presume because it came out of plaintiff's possession that it was executed. There was only an inchoate execution here. There could be no delivery presumed here but that which Mr. Thompson shows. They say we should have cross-examined Mr. Thompson. The plaintiff now wants to get back to a jury and try it without Thompson.

All the cases show that where the document comes out of the hands of the grantee, and there are circumstances to show that it was not to become operative, it is not to be treated as a valid deed.

The document is not even an escrow. There was no execution by the wife, and if it had been executed it would be merely an escrow in the hands of Thompson. The plaintiff's counsel says, it is true all that arrangement with Thompson fell through, but afterwards the plaintiff got possession of this deed, and the court must presume a delivery to Cogswell of the document as a deed. Thompson's last words in evidence are that the release was not delivered, because Mrs. O'Connor refused to sign. Cites *Burrill's Law Dict.*, definition of "execute."

There is nothing to show that the deed was not brought into court by Thompson. It would be perfectly consistent with his evidence.

WILKINS, J.—Suppose Thompson did actually hand over the paper, although while in his hands it was an escrow, what would be the effect of handing it over? Would the law presume execution of it?

Weatherbe, Q. C.—Thompson said he had no authority to deliver it on any other terms than those stated. It would be a fraud in Thompson to hand it over, and the act could not amount to a delivery or make the deed valid.

The fact of the paper being in Gray's hands is perfectly explainable. When the proposal was made to convey to a trustee, it is reasonable to assume that the papers were obtained by Gray to make out a new mortgage. The solicitor of the lender makes out all the papers, and usually holds all the papers.

The deed from Brehm was made out and put in Gray's hands to be recorded when all the papers were completed. He had all the papers, and there is nothing singular about it. The only singular thing is the bringing of this action.

The bond itself shows on its face that it is incomplete, as it is conditioned for the payment of a mortgage made by himself and his wife. There is no such mortgage executed. It was signed by O'Connor and handed over on the condition that his wife was to sign.

Hope v. Harrison is no authority for the plaintiff. See 11 Jurist, 1097. It is only where there are no opposing circumstances that the question can be left to the jury under this case. The strongest cases as to presumption of delivery only go this far.

Rigby, Q. C., in reply.—No question of fraud can come up in this argument. If Mr. Gray had brought this action on a deed fraudulently obtained by Mr. Gray, the question should have been left to the jury. The contention as to fraud was not relied on at all. (McDONALD, J.—If it had been I would not have non-suited.) Therefore we are to deal with the question without any reference to fraud. The deed must be taken as coming into the hands of Gray in good faith as the attorney of Cogswell.

The fallacy of plaintiff's argument is the contention that the evidence shows that the deed was delivered to Thompson as an escrow. There is no evidence of delivery to Thompson. The delivery of a deed is attended with some formality. There is no such formality here in the assumed delivery to Thompson. There is no evidence of delivery to Thompson at all or of any delivery to any one. We rely on the fact that possession is proof of delivery and have cited the cases to support that contention.

It is argued that the condition on which O'Connor signed the mortgage was that the wife was to execute it. Is that a condition that O'Connor can take advantage of? That condition is for the benefit of Cogswell, and not of O'Connor.

The whole of that first contemplated arrangement fell through, and another was made for conveyance to a trustee to be recorded as soon as Brehm's deed was recorded. Brehm's deed was afterwards recorded, and this document comes out of Gray's hands. It must be presumed, not that there was an execution, but that the execution previously inchoate became effectual by valid delivery.

If the deed was delivered to Gray on a condition, evidence should have been given of that.

The evidence of Mr. Thompson as to the condition on which it was to be delivered is all I have to contend with, and the ques-

tion is, whether that rebuts the presumption arising from the possession of the document by Gray for Cogswell.

Mr. Thompson does not prove a complete execution, but only signing and sealing. The Court must presume that there was a subsequent delivery.

On the meeting of the Court for the delivery of judgments on the 5th day of February, 1877, it appeared that the four judges who heard the argument were divided in opinion respecting it, two being in favor of sustaining the nonsuit, and two thinking it should be set aside.

YOUNG, C. J., delivered the following opinion:—

I am very well convinced that, if *Mr. Gray*, representing the plaintiff, were on the stand, the difficulty in this case would vanish in five minutes. *Brehm* purchases from the plaintiff a number of lots and gives a mortgage for \$9000. A subsequent mortgage is given by *Brehm* to *Jennett & Taylor*. Then *O'Connor* steps in and says to *Brehm*—"On the purchase of this property from you for \$9000 I will pay off *Jennett & Taylor's* mortgage of \$3000,"—which he seems to have done. Then he gives a new mortgage and bond to *Cogswell* himself, on the condition that *Cogswell* will release the mortgage he holds from *Brehm*, an every day transaction. After the deed then from *Brehm* to *O'Connor* was made, and after *Jennett's* mortgage was released, *O'Connor* gives a mortgage for the balance of \$6000 odd, and a bond in the ordinary form. Then comes the difficulty. *Mrs. O'Connor* refuses to execute the mortgage. What was *Mr. Gray* to do then,—release the *Brehm* mortgage and take a mortgage with the dower of the wife over-hanging? He is obliged to go back to the *Brehm* mortgage. Now the mortgage by *O'Connor* and the bond were handed to Thompson, to be handed over when this agreement between *Cogswell* and *O'Connor* was perfected. It was not perfected, and I have no doubt these documents were in the hands of *Thompson* as escrows, and that he never delivered them to *Gray*. It would have been a breach of faith to do so. But I find this very material fact,—that the deed from *Brehm* to *O'Connor* went into the hands of *Mr. Gray* and was recorded.

How does that affect the case ? The title is in *O'Connor*, subject only to \$6000 still due to *Cogswell*. How did the mortgage from *O'Connor* to *Cogswell* and the bond in connection with it get into *Mr. Gray's* possession ? It is a pity he did not tell us, but I look at the record. It is pleaded that the plaintiff by fraud, covin, and misrepresentation obtained these papers, but there is no fraud proved, and it is admitted that they were in the hands of *Mr. Gray* in good faith. All the cases show that a deed, being in the hands of a party who has an interest under it in good faith, is abundant evidence of delivery. We prove deeds every day by the hand-writing of the party,—that is all. Nobody contends that you must prove delivery. The possession of the deed in good faith is ample evidence, in both the English and the American cases of delivery. I hold therefore, that the fact of *Gray* possessing these two papers is ample *prima facie* evidence. But there is another view of the case,—it is this : *Mr. O'Connor* buys this property and pays about \$3000 for it. Under *Brehm's* mortgage *Mr. Cogswell* steps in and, there being no other purchaser, buys it for \$4000. Then *Mr. Gray* brings action upon the covenant, and on the bond for another \$3000. That is a monstrous thing ; I think that cannot be done either in this Court or in equity.

His Lordship here read a passage from *Fisher on Mortgages*, and concluded by saying, that he considered that the plaintiff could not recover in this suit, but that, as the Court was equally divided, there could under the present practice of the Court be no rule. He added that he was of opinion that the nonsuit should be set aside, not that the plaintiff should bring a new action, but that the parties should come in and put themselves in a proper condition before the Court ; that the defendant should have the full benefit of the sum realized by *Cogswell* out of the property, and if not that the foreclosure should be opened.

WILKINS, J., read the following opinion :—

When the plaintiff's Counsel took the position, that the possession by plaintiff of the bond, executed by the defendant, and proved to have been executed as an escrow by him, raised a *presumption* of a delivery absolutely, it was met by a contention, that

nder the evidence given by *Mr. Thompson*, such a presumption could not arise. But, I apprehend, that contention involved a fallacy. It would have been a legitimate argument if there had been in the case the slightest ground for a suspicion, that, subsequently to what took place in *Mr. Thompson's* office, the instrument, executed as an escrow and left with *Thompson*, had found its way into *Mr. Gray's* hand fraudulently, or in any other way than by a subsequent handing it over to him either by *Mr. Thompson* or by the defendant; but fraud being out of the case, it is morally certain that it did come to *Gray's* hands in one or the other of those two ways. *Mr. Thompson* stated, in effect, that, as far as his memory served him, he made no delivery of it to *Gray*, and, after what had taken place in his office between defendant and him, he could not have done so; especially as he stated that he was never authorized to deliver the instrument in any other terms than those mentioned by him. A subsequent delivery to *Gray* by *Thompson* we must then regard as negatived by the evidence. Fraud being out of the case, nobody but the defendant could have handed the instrument to *Gray*. To no person but to him would *Mr. Thompson* have delivered it. As to the defendant's having it in his power to obtain it from *Thompson* no doubt can exist, and nothing could be more natural, in my opinion, than that *Mr. Thompson* should unhesitatingly deliver the instrument to defendant, intimating his desire to have it for delivery to *Mr. Gray*. All that we, for the purpose of our present inquiry, have to ask ourselves is, "What are *prima facie* the legal inferences as to plaintiff's right to sue on the instrument to be drawn from the fact of plaintiff's attorney's possession of it as produced and proved by him at the trial?"

The case of *Hare v. Horton*, 5 B. & Ad., 715, (and there are other cases to the same effect with it) answers that question. In that case, plaintiff at the trial produced a deed of mortgage executed to him by the defendant, and the latter proved that, on executing it, he handed it to his own agent, intending it, as he alleged, to remain as an escrow till the performance of a certain agreement by another party to the mortgage. *Held*, that the possession of it by plaintiff was *prima facie* evidence that it had been delivered to him as a deed. The fact was that the

deed was executed by the defendant and one Spurrier (neither the plaintiff nor any person on his behalf being present), and witnessed by the defendant's attorney and his mining agent. The deed was then delivered to the mining agent, but there was no evidence of his having delivered it to the plaintiff, except that the plaintiff produced it at the trial.

PARK, J., said: "I said at the trial that, although there was "evidence that the deed was at first delivered as an escrow, yet "its being afterwards found in the plaintiff's possession was some "evidence that the condition upon which it was so delivered had "been complied with; and the defendant should, if it had been "in his power, have shewn the contrary." Of course, if that case had been decided on that ground, and not on the broad ground expressed in the marginal note, and in the opinion of Mr. Justice TAUNTON, it wouldn't be an authority here, in respect of *Mr. Thompson's* proof that the condition never was performed. But, not knowing what may have passed between the defendant and *Gray*, we have no conclusive evidence on that point. The Court at the trial knew nothing as to transactions which may have occurred between those parties. But the Court decided the case of *Hare v. Horton*, and could not but have decided it, on the broad principle thus stated by TAUNTON, J., who said, "*The fact of the deed* (a deed bear in mind which had been "delivered as an escrow) *being in the plaintiff's possession was* "*prima facie evidence* (not that the condition of an escrow had "been complied with, but) *of its having been delivered to him* "*as a deed.*" He couldn't have so expressed himself if he intended to limit or qualify the principle announced by his words. That principle, (and see also *Exton v. Scott*, 6 Sim., 40) in my opinion governs this case. That principle was not deemed by the court the less to govern it, because, at the time of the proved execution, it was intended to operate as an escrow. No question can arise as to the character of that delivery of which *Mr. Thompson* was the witness. And if it were not quite possible that, subsequently to that delivery, this defendant obtained the deed from *Mr. Thompson* (who alleged nothing to the contrary) and handed it over to *Gray*, and executed it anew to him for his client, making, it may be, some arrangement with *Gray* that

superseded altogether the arrangement spoken of by *Thompson*,—but for this, I say, the legal rule of presumption from the fact of possession of the deed would not arise in the case. Not the slightest prejudice to the defendant could have resulted from applying to the case that legal presumption based on the supposed facts, because the effect of doing so would have been merely to impose the burthen of negating the presumption of a delivery absolutely on the defendant. Had he negated a delivery of the deed to *Gray* altogether, or shewn that, though there was a delivery, it was not one that was to take effect absolutely, the legal presumption would have been cut down, and the Judge would have been bound to instruct the jury to find a verdict for the defendant. For the same reason no real prejudice could have resulted to defendant from assuming, as a fact, a delivery by him of the deed to *Gray* as supposed. So that the question is simply, who, at the trial, was bound to explain how and under what circumstances *Gray* obtained possession of the deed. It is a fixed principle of law that execution of a deed absolutely is inferred, *prima facie*, in favor of him who produces at a trial an executed deed. It appears to me that the rule should be made absolute.

McDONALD, J., read the following opinion:—

Neither at the trial nor at the argument of this cause was the question of fraud in obtaining possession of the mortgage and bond in question insisted upon, although there is a plea to that effect upon the record. Nor do I think that the bare possibility of such a question arising under the evidence ought to influence our judgment as the case is presented to us. I find no instance in which the possession of a document was held to have been fraudulently obtained, simply because it was found in other hands than those of the legal custodian. Here the mortgage and bond upon which this action is brought, are proved beyond a doubt to have been in the hands of *Mr. Thompson* as escrows, not to have any effect till the conditions were performed by the plaintiff, namely, the releasing of the mortgage which he then held on the property proposed to be sold by *Brahm*.

This was proved by the plaintiff's own witness, and the *onus* was upon him of farther proving that the escrows ceased to be such before action. An escrow is a writing under seal delivered to a third person to be delivered by him to the person whom it purports to benefit upon some condition. Upon the performance of the condition it becomes an absolute deed; but, if the condition be not performed, it never becomes a deed. (*Wharton's Law Lexicon*, 357; 2 Bl. Com., 307). It is not the delivery, but the performance of the condition and the delivery, that would make the deed operative.

It is said that the possession of the deed is *presumptive* evidence of the condition having been fulfilled, but we have here the *positive* evidence of *Mr. Thompson*, that such condition, that is to say, the releasing by the plaintiff of the mortgage, which he then held, to the defendant, was not fulfilled, and we cannot uphold the presumption of its having been fulfilled without presuming, at the same time, that *Mr. Thompson* said what was not true when he said, "The release was not delivered because Mrs. O'Connor refused to sign the mortgage" I find it impossible so to presume. The case of *Hare v. Horton*, 5 B. & Ad., 715, was very different from this, because there was no condition in that case to have been performed by the mortgagee but by one of the mortgageors, and the *existence* of any such condition does not appear to have been *within the knowledge* of the mortgagee or of any one acting for him, and because there was no evidence in that case, as there is in this, that the condition was not performed. The *onus* was therefore very properly thrown upon the defendant in that case of proving, to some extent, the non-performance. See *1 Taylor on Evid.*, sec 376, where it is laid down that, where the subject matter of an allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character, and even though there be a presumption of law in his favor. The Judge on the trial of that cause, *Hare v. Horton*, said that the possession of the document furnished evidence that the *condition was complied* with, and it was held that, under the circumstances, the defendant should have given negative proof. But

here, in addition to the distinction between the two cases, as to the parties who were to have performed the conditions, and within whose knowledge the facts were, we have against the presumption, if any presumption could arise in this case, the positive oath of a highly credible witness, that the condition was not complied with, and then we have that witness corroborated by the letter of the plaintiff's solicitor, *Mr. Gray*, to the defendant, showing that the very mortgage, which, by the condition, was to have been released, was by the plaintiff subsequently foreclosed and the property sold for \$4000.00, thereby defeating even the possibility of the condition ever being performed at any time. To presume further that there was an entirely new agreement (and without such a presumption it is impossible for the plaintiff to recover) would be to presume every thing in favor of a plaintiff, who, as will presently appear, shows that upon the merits he has no right to recover one farthing, and everything against a defendant who has right and justice on his side. Under the evidence before us, the facts and justice of the case are so strongly in favour of the defendant, that, if it went to a jury, and a verdict had been found in favour of the plaintiff, it would necessarily have been set aside as against law and evidence, but it is very difficult to think that any jury could ever have found in favour of the plaintiff, on evidence like this. Here, we have the plaintiff holding a mortgage of *Brehm's* property for about \$9000, which mortgage he forecloses, the property bringing about \$4000 at the sale. Before the foreclosure the defendant purchased *Brehm's* equity of redemption under an agreement with the plaintiff to execute the mortgage in question here and to deliver it with the bond *on getting Brehm's mortgage released* by the plaintiff. That equity of redemption, according to the evidence, was \$5000 worse than worthless, yet the defendant paid \$3000 for it, and is now sued for \$2,934 more, as part of the price of that property which the plaintiff never released to him according to his agreement, but which he now holds in his own right under the mortgage that he undertook to release to the defendant. Can it be supposed for one moment that under these circumstances the defendant would ever have agreed to deliver the bond and

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mortgage in question to the plaintiff? He had nothing of the slightest value to mortgage till he should have received the money, lease bargained for, and yet, by the terms of the mortgage sued upon here, he is represented as warranting and defending to the plaintiff that title which the plaintiff himself then held and now holds contrary to his agreement with the defendant. And why should the plaintiff, who never gave anything in exchange or by way of consideration for the mortgage and bond sued upon, who never did anything for the defendant nor lost anything, nor even ran any risk by the negotiation that took place, ask for or receive such bond or mortgage without first releasing *Brehm's* mortgage according to the agreement? I must confess that, as the evidence stands, I never knew a more unjust claim either inside or outside of a Court of Justice. It is true that the plaintiff might possibly, if he tried, have explained this transaction in a more satisfactory manner at the trial, but though very much invited to do so, he preferred to accept a non-suit. He could have forced the defendant into a defence and then given his explanations in reply, or he might have given his explanations in the first instance, but he chose to rely upon mere presumptions of law against positive proof. There is nothing now to prevent him from having a speedy trial by bringing a new action, although this rule would be, as I think it ought to be, now discharged.

SMITH, J., read the following opinion:—

This is an action brought upon a bond and covenant in a mortgage alleged to have been given by the defendant to the plaintiff. It was tried before Mr. Justice McDONALD in November last at Halifax, and plaintiff submitted to a non-suit with leave to move to set the same aside, and the rule was argued in January last.

The only material witness called was *Mr. Thompson*, who proved the execution of the bond and mortgage by the defendant, and that the same were delivered to him as escrows. The plaintiff relied upon this testimony and the production of the documents by *Mr. Gray*, the agent and solicitor of the plaintiff, as establishing a *prima facie* case. The learned Judge did not

der such a case made out and directed a non-suit, and we now to consider whether this direction was right. It will be necessary to a clear apprehension of the case to notice briefly material and undisputed facts out of which the documents in question evidently arose, not as having relation to the merits of the transaction between the parties, but chiefly, if not entirely, for the purpose of a view to shew the nature of the condition until the performance of which they were to be retained by *Mr. Thompson* as depository.

It appears that antecedent to the date of these documents the plaintiff held a mortgage of certain real estate belonging to *Brehm* in the city of Halifax, a portion of which property the defendant was desirous of purchasing, and it was agreed between said *Brehm*, the plaintiff, and defendant, that a portion of such part should pass directly from *Brehm* to defendant, and that the plaintiff should release the same from his incumbrance, and take from the defendant and his wife a mortgage, and from the defendant a bond. Without such a release it is clear that the defendant would receive merely an equity of redemption subject to plaintiff's mortgage, and one also to one *Jennett*, in which state of things it can hardly be supposed that he would propose to give, or that *Mr. Gray* would require, a mortgage of the defendant's equitable right to redeem a property which the plaintiff had himself a mortgage. It was consistent with reason, common sense and justice, that the agreement which *they did make*, and to which I have referred, should have been come to. In short it is an every day transaction. Without doubt, in view of the whole transaction as evidenced from *Mr. Thompson's* testimony, the documents in question were lodged with and held by him to be delivered and executed, only on the performance of the condition of execution and recording of the releases from plaintiff and *et al.* He became, for the purpose for which the trust was created in him, the agent of both parties, and could not, without their joint consent, hand over to either those executed instruments, until the condition was performed. Undeniably, the evidence of the plaintiff's own witness, that condition was not performed, and we find the bond and mortgage, exe-

cuted by defendant with an *object agreed upon*, in the possession of *Mr. Gray*, with that very object defeated; and with explanation as to how that possession was derived.

I do not deal thus with the facts, either as imputing any impropriety to *Mr. Gray*, or with a desire to draw into my consideration the merits of the case. But it is all-important that we should, when dealing with the sufficiency or insufficiency of a presumptive case, *which may be rebutted* by facts and circumstances, have the highest regard to the intention of the parties and the objects sought to be obtained by the execution of these documents, which, if delivered as deeds, must have been so with some other and independent purpose.

The condition, upon the performance of which the bond and mortgage were and only could become deeds, having been shown by plaintiff's witness never to have been performed,—I must say I am puzzled to understand how the mere possession of them by the plaintiff creates that *prima facie* case, which all the authorities recognize and hold as sufficient. Until condition performed the executed papers remained mere scrolls in writing, and of no more efficacy than any other written scrolls, but when, upon the performance of the condition, they were delivered to the grantee or his agent, they would then become deeds to all intents and purposes, and the title would pass and the bond become operative from "*the date of delivery*;" *3 Wash. on R. Prop.*, 586. If then the efficacy of a deed once delivered as an escrow is absent, and it conveys no title until delivery and after condition performed, and cannot relate back to its date or other period, then how can we be asked to presume these documents delivered as deeds, when it is proved that the condition *was not performed*.

In *3 Wash. on R. Prop.*, 586, it is laid down—"If the grantee obtain possession of the escrow without performance of the condition he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition."

I am perfectly aware of the well-known common law principle, which was pressed upon us at the argument, and which appears to have great weight with some of my learned brethren,

with whom I have the misfortune, and I may almost say presumption, to differ, that the possession of a deed by a party is *prima facie* evidence that it has been delivered to him as a deed. I concede this as being the law of the land; but I entirely fail to perceive how it can apply in a case where there are strong rebutting circumstances, and a delivery as an escrow proved and the condition unperformed.

I consider the case of *Hare v. Horton*, 5 B. & Ad., 715, strongly in point. In that case the plaintiff produced at the trial a deed of mortgage executed to him by defendant. The defendant proved that he handed it to his own agent as an escrow. In delivering his judgment PARKE, J., who appears to have tried the cause at *Nisi Prius* says—"I said at the trial that, although there was evidence that the deed was at first delivered as an escrow, yet its being afterwards found in the plaintiff's possession was some evidence that the condition upon which it was so delivered had been complied with, and the defendant should, if it had been in his power, have shown the contrary. I still remain of that opinion." TAUNTON, J., in the same case applies the general principle without reference to the condition being performed. It was not necessary for him to have done so, for he essentially decided the same thing as PARKE, J., but can it be urged or gathered from the language of TAUNTON, J., that, had there been proof that the condition upon which the mortgage had been delivered had not been complied with, he would not have laid down and applied the same law as enunciated by his brother judge? PATTERSON, J., remarked on this point, "a sufficient answer has been given." It is just as probable that he referred to the answer given by PARKE, J., as by TAUNTON, J. At all events it is a great satisfaction to me to know that I apprehend the law as Mr. Justice PARKE, and if I am wrong I am consoled by the reflection that I have so learned and respectable a companion in error. So able a text writer as *Roscoe*, in his last edition, seems to be equally at fault, if I misapprehend the substantial purport of this decision, for at p. 154 he says "Where A. executes an instrument and delivers it to B. as an escrow to be delivered to C. on a certain event, possession by C. is *prima facie* evidence against A. of the performance of the condition," and cites this case as his authority.

Certainly it is ; and if the plaintiff's witness in this case had proved nothing more than the delivery of the documents as escrows, the possession of them would unquestionably, and no lawyer would be obtuse enough to doubt it, be *prima facie* evidence of the delivery of them as deeds, the condition being presumably performed. Can the possession of the deeds in this case presume the condition performed ? To answer in the affirmative would be to assume the novel position of setting *presumptions* against *facts* ; for the plaintiff's witness testifies that it was not, and they therefore could not operate as deeds. It is true that some months elapsed from the time when the instruments were deposited with *Mr. Thompson* before the arrangement upon which they were based fell through, and as *Mr. Thompson* had no right to deliver, as he had no authority, the deeds to *Mr. Gray*, it was contended, to fortify the *prima facie* case, that the defendant may have obtained the possession of them and delivered them himself. I can only say I see no ground for such a probability. In the first place *Mr. Thompson* had no more authority or right to deliver them to the defendant than he had to give them to *Mr. Gray*. Both had an interest in their being retained by him until the condition performed, which would give them value as deeds, and it is most unfortunate that *Mr. Thompson* cannot recollect how the papers passed out of his possession. Without supposing some new arrangement come to between defendant and *Mr. Gray*, which we have no proof of, not only would such a presumed delivery be utterly a departure from the original purpose and understanding of the parties, but it would be to suppose the defendant egregiously deficient of regard for his own interest, and utterly incapable of transacting the ordinary business of life. I am of opinion that the rule to set aside the non-suit should be discharged.



CUMMINGS v. BROWN:

The power granted by Chapter 94 of the Revised Statutes to Prothonotaries, to give orders for security for costs, for better particulars, and for further time to plead, is limited to the County where the writ is returnable.

Rule *Nisi* to set aside a rule for security for costs, granted by Prothonotary in Annapolis County, while the action was brought in Halifax, and the writ was made returnable at Halifax, against defendant living in Annapolis.

Frith, in support of rule.—No prothonotary can grant an order for security, except the prothonotary for the county where the venue is laid and the writ returnable. The order is headed "*Halifax, S.S.*", signed "George R. Grassie, Prothonotary," nothing further. The words "any Prothonotary" in the Statute, *R. S.*, cap. 94, sec. 110, must be read in that light.

Secondly, the power is only to be exercised in case there is no judge in the county. That fact should be expressed on the face of the order; *6 T. R.*, 587.

The affidavit of Brown applying for security is made before L. S. Morse, the attorney in the cause. (*Graham*.—That point has not been taken in the rule.) It is included in the words "on the grounds disclosed in the papers on file." *Ch. Arch.*, 1234; *8 T. R.*, 632, *5 Dowl.*, 5688.

Graham, contra.—The act provides for illness of Equity Judge, or absence from the County. The common law judges can sit in his place. It is not necessary to state in the order that the Equity Judge was ill.

(*YOUNG*, C. J.—The Common Law Judge is not a subordinate authority.)

(*DESBARRRES*, J.—I state the illness of the Equity Judge in every case where I act in his place.)

It is not always done and would make some trouble if the orders were to be set aside twelve months after.

He must come in on affidavits and shew the irregularity. It is not a nullity, and being an irregularity it has been waived.

The fact of an affidavit being sworn before an attorney in the

suit does not make it a nullity, but an irregularity, if even that, and cannot be moved on unless within a reasonable time. The ground, moreover, is not included in the rule.

The order is dated in Annapolis, where defendant resides.

Cites *Freeman v. Freeman*, tried before Equity Judge.

The proceeding is a very simple one. It is a mere question whether plaintiff is absent or not.

The act is remedial. The legislature considered the inconvenience of going to a judge at Chambers. If the defendant has to go where the venue is laid he might as well go to a judge at Chambers and better,—for instance, where a cause is brought in Baddeck against a defendant at Yarmouth. There it would be more convenient to go to a Judge at Chambers, and the remedial purpose of the act would be defeated.

In no case where judicial power is given to prothonotaries is it given so largely as here. In other cases it is "*the Prothonotary*." Here it is "*any Prothonotary*." Where the clause was originally adopted it was to "*the Prothonotary*:" *Acts of 1855*, cap. 4, sec. 223.

If the rule was made by a prothonotary while the Judge was there, it is an irregularity which they should have moved to set aside. If it is a nullity they can not move to set it aside.

YOUNG, C. J., now (February 5th, 1877,) delivered the judgment of the Court:—

Writ returnable to Halifax, and served on defendant residing in Annapolis County. After due notice, the Prothonotary there gave an order for security for costs. The Chief Justice granted an order *nisi* to set it aside, which has been argued here. The Practice Act in three cases confers a *quasi* judicial power on Prothonotaries, by Sec. 64 in case of a summons for particulars, by Sec. 110 in cases of security for costs, first introduced by chap. 4 of the Acts of 1855, Sec. 228, and by Sec. 171 in granting further time to plead. In none of these instances does the Act specify, to the Prothonotaries of what county it is to extend; but as it is obvious that some limit is necessary, and as Sec. 110 applies only "in the absence of the Judge from the County," we think it most convenient to limit the power, in all

three cases, to the County where the writ is returnable. The rule *nisi* therefore will be made absolute, but without costs, as this is decided for the first time, and the defendant will be at liberty to move *de novo* on his affidavit for security.

On the day following the delivery of this judgment,

Graham moved that the default, entered while the prothonotary's order was outstanding, be taken off.

Sedgewick, contra, argued that the prothonotary's rule had been held by the Court to be a nullity.

The COURT directed the default to be taken off.

MACKINLAY v. CITY OF HALIFAX.

Where plaintiff's horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city.

Held, that, the drain being proved to be well constructed, and of a kind (uncovered) usual in the suburbs, the City was not liable.

This was an action on the case to recover damages for injury occasioned to plaintiff's horse, resulting in the loss of the horse, through the alleged defective condition of a certain road or street under the control and management of defendants. Defendants pleaded that the road or street was in good condition, and also that plaintiff's horse became alarmed and shied.

The cause was tried before Mr. Justice WILKINS, and the jury found a verdict for plaintiff for \$200. A rule *nisi* was granted by the learned Judge who had tried the cause to set the verdict aside on the ground that it was against law and evidence. The rule was argued 15th December, 1876.

Thompson, in support of rule.—There is no evidence of negligence on the part of defendants. The immediate cause of the injury was the fault of the driver or the horse. The locality of the ditch into which the horse fell was in the suburbs, not in the city. The ditch was as far as possible removed from the

portion of the road used by the public, being at the ~~ext-~~ end of the road, next the wall. The City Engineer proves that the drain was necessary, and that its shape, with straight ~~side~~ was the only shape that could be adopted. It cannot be contended that an underground drain should be constructed to drain such an extensive suburban district. The plaintiff's declaration alleges that the ditch should have been covered, but the fact that it was not concealed is in defendants' favor. Cites *Hurlst. & Norm.*, 745, *Bolch v. Smith*; 4 *O. B., N. S.* 556. The evidence of plaintiff's witness proves that the horse was frightened at a cart loaded with benches ahead of him, and shied from the middle of the highway. A disinterested witness called by defendants, swore that the "horse was in a great rage like running away." Cites 2 *Taunton*, 403; *Marryall v. Stanley*, 3 Scott's N. R., 392; *Butterfield v. Forrester*, 1 East, 160.

Rigby, Q. C., contra.—The verdict is not a mere bald verdict for damages, but also recommends that the city make the drain safe. Cites sec. 208, p. 83, of the revised city charter also sec. 5, p. 94, also sec. 1, p. 76, to shew that it is the duty of the city to keep this drain, with others, in repair. Cites *Leishman v. London, Brighton, and S. Coast Ry.*, 23 L. T. R., N. S., 712. His lordship told the jury that the evidence was weak, but having left it to the jury, their finding is conclusive. Contributory negligence is negatived by the jury. The jury have found blame attaching to defendants; *Sound on Negligence*, 14. The evidence is that the drain had a perpendicular side two feet six inches high next the street, and it is for the jury to decide whether it was deep enough to require to be covered. The City Engineer says drains as deep as this are exceptions in the city, and there is no reason why this should not be covered. The case of *Bolch v. Smith* is an entirely different case, because there was no obligation on the part of defendants to keep the path in repair; the path plaintiff's horse was used only by leave of defendants. The plaintiff's case rests upon the obligation of the city to keep the road and drain in proper condition, and on the finding of the jury that this duty

should be covered. *Dillon on Municipal Corporations*, sec. 802 ; *Ward v. City of Halifax*, unreported.

Motton, in reply.—Plaintiff's driver relied on previously known character of the horse, or he could have stopped the horse before he reached the ditch. There is nothing in the evidence to shew that the driver did anything to prevent the accident. The City Engineer's evidence, uncontradicted, is that a ditch or drain such as existed at that point was absolutely necessary for the drainage of the neighborhood.

SMITH, J., now (February 5th, 1877,) delivered the judgment of the Court :—

This action was brought to recover damages from the City of Halifax, for the loss of a horse of the plaintiff's, arising out of the alleged unsafe construction and condition of a drain, on the side of the Quinpool road, within the City limits. It was tried before Mr. Justice WILKINS, at Halifax, in April last, and a verdict was given, contrary to the learned Judge's charge, for the plaintiff for \$200. After looking carefully into the authorities cited, I think this verdict cannot be sustained. The duty of constructing, sustaining and repairing drains within the City is doubtless imposed upon the City authorities, but I can find nothing in the revised charter under which the plaintiff seeks to fasten liability on the defendants, prescribing any particular mode of constructing such drains, or any duty imposed upon them to cover them. Had a defined mode of construction been furnished, or had a requirement that such drains should be covered been inserted in the Act, and there had been a violation of these enactments, and in consequence the plaintiff had received damage, the defendants' liability would have been unquestionable. No such statutable duty being imposed, we must ask ourselves what negligence the City authorities have been guilty of in connection with the drain in question, which calls upon the defendants to pay the plaintiff damages. I think it can hardly be contended that every drain, or ditch, inside of the City limits should, at the very large expense which it would necessarily entail, be covered in. In what then consists the negligence of the defendants in view of the evidence? It must

be borne in mind it is for the plaintiff to make out his case, and to show, as remarked by KELLY, C. B., in the case of *Philips v. The Great Eastern Railway Co.*, 21 L. T. R., 443, "that the accident arose from the negligence of their servants, and if the evidence left this in doubt the jury must find for the Company." I have already said that the City charter imposes the duty of constructing and keeping in repair the drains within its limits, but it is most essential here to enquire in what manner it is to be done, and what amount of engineering care and skill they are compelled to exercise to relieve them from liability for accidents to the public in connection therewith. Clearly such drains should be constructed, when contiguous to a public road or thoroughfare, on the best practicable plan under the circumstances, in view of their necessity and danger to travellers. Does the evidence show, and the plaintiff was bound to prove it beyond doubt, that this was the case with reference to the drain in question? In *Wharton on Negligence*, Sec. 988, it is laid down, referring to the maintenance of public roads as creating responsibility for accidents arising from defects; "It is sufficient to state that, in conformity with the principles heretofore noticed, the parties bound to the maintenance of the road, while required to exercise the diligence that would be exercised by good engineers and road makers under the same circumstances, are not to be held to the adoption of improvements, which, though shown to be valuable, are not such as are applied to roads built in the situation, and under the conditions, of that under investigation." "And the opinion of competent engineers and other experts will be a protection to the municipal authorities." This immunity of course would not be created by the opinion of experts where the road was patently defective. Such a defect in this case, however, I cannot regard as at all established. The plaintiff's case alone creates such a doubt of negligence existing on the part of defendants, by which the accident to the horse was proximately caused, as in my opinion to bring it within the principle laid down by KELLY, C. B., in the case already referred to.

The evidence of *Mr. Keating*, the City Engineer, is, I think, most important, as distinctly negating the fact of either a de-

ective construction or maintenance of the drain. He says; "I know the drain and have examined it particularly; the drain is close up to the wall, a common stone ditch; it is indispensable there to the road; without its being covered I consider it quite safe, as regards travellers using the street. I don't know of an instance of a covered drain beyond the Common, as this is—to cover those beyond it would be very expensive. I think the drain in question was constructed on principles safe as regards the travelling public." "It is true," he adds, "that drains as deep as this are exceptional in the city," but this cannot affect the view he previously expressed.

Without referring to the point raised at the argument in reference to contributory negligence, upon which much may be said, I think the verdict cannot be sustained, and that the rule must be made absolute.

WOODWORTH v. BLACKADAR ET AL.

Change of venue refused, preponderance of convenience being proved, by plaintiff's affidavit, to be largely in favor of venue as laid.

The Judge before whom the application for a change of venue was made, having discharged it, directing the plaintiff, in accordance with an offer in plaintiff's affidavit, to enter into a rule to make certain admissions of technical but necessary matter.

Held, that this condition imposed upon plaintiff was not a ground for appeal by defendants.

This case came before the Court on an appeal from the decision of Sir WILLIAM YOUNG, C. J., delivered at Chambers, discharging a rule *nisi* to change the venue from Kings County, where the action was brought and where the plaintiff resided, to Halifax County, where defendant resided, and where the alleged libel, the subject of this suit, was printed. The nature of the affidavits and the grounds on which the change of venue was claimed and resisted, are sufficiently set forth in the judgment of the Court.

The following is the decision delivered at Chambers (May 30th), by Sir WILLIAM YOUNG, C. J. :

In this action for libel a rule *nisi* was granted on the 17th inst. to change the venue from Kentville to Halifax, on an affidavit of one of the defendants, in reply to which there was produced an affidavit of the plaintiff. The declaration and pleas were also referred to at the argument, and I must express my deep regret at such papers being on file in this Court, indicating, as they do, such bitterness of feeling and so many violent mutual recriminations ; I must look to this motion, however, purely as a point of practice, and to the affidavits only in that view. The plaintiff complains of a libel published in the *Acadian Recorder* newspaper at Halifax, and extensively circulated in Kings county, where he resides, and in his affidavit he swears that the several charges in the libel, which are of the gravest character, are wholly false. Now, according to the old practice in *Tidd*, 605 and 2 *Y. & J.*, 110,* in an action for libel published in a newspaper in one county and circulated in other counties, the Court of Kings Bench will not change the venue, but if the writing and publication be both confined to one county, the venue may be changed into that county. The modern cases will be found in *Fisher's Digest*, 6507, and in 23 *L. T. R.*, 705. In *Hobart v. Wilkins*, 1 Dowl. P. C., 460, the action was for a libel published in a Cumberland paper. The venue had originally been laid in Cumberland, and had been changed to Lancashire upon the common affidavit. The motion to change it back was founded on an affidavit, stating that the paper was published as much in one county as the other, and PATTERSON, J., held that the plaintiff was entitled to have the venue changed back on that affidavit. This was long before the rule of 1853, which we have adopted. So also was the case of *Robson v. Blackwell*, 2 Dowl. P. C., 645. This was an action for a libel published in a Newcastle paper, and the venue was changed from London to Newcastle on an uncontradicted affidavit of the defendant, which stated that several pleas of justification were to be pleaded, that all the witnesses lived at Newcastle, and that the expense would be greatly increased if the action was tried in London. This case would govern the

*Cumming v. Naylor.

present, if the defendant's affidavit stood unanswered, and although it is an action of libel, I think the rule in our own cases, *Harris v. Fader*, 2 Oldright, 371, and in *Payzant v. Montgomery*, which last, *I regret to say, has not been reported*, would apply. It is really a question upon the affidavits. In *Church v. Barnett*, 23 L. T. R., 705, there was an affidavit in answer to the defendants, and BEVILL, C. J., recognised the general rule that the preponderance of convenience was to be looked to, and WILLES, J., after questioning the resolutions of the Judges as reported in *De Rothschild v. Skilston*, 8 Exch. 503, and which, he says, were only suggestions of a committee of the Judges and never adopted by all of them, proceeds to remark that, since the date of that decision, many attempts have been made by defendants on this pretext to deprive plaintiffs of a speedy verdict without success. "The plaintiff," he adds, "has generally a right to lay his venue where he pleases, but "if the place of trial should be capriciously chosen, a Judge may "change the venue upon the defendant's application, but where "the plaintiff has not exercised a capricious choice, it is for the "defendant to show a practical preponderance of convenience in "trying the cause at the place he proposes before his application "should be granted. It devolves upon him to make that clear." In considering the two affidavits before me it would be an invidious task and a waste of time to go into particulars. In the first place, the plaintiff emphatically denies the whole of the charges, and declares that no reliable witnesses can be adduced to support them. But as such a denial would, of itself, be insufficient, he offers to make several admissions of technical but necessary matters, which would simplify the defendants' proofs, and swears to a long list of witnesses by name, nearly thirty in all, residing in Kings County, all of whom with others, he says, as he is advised and verily believes, are material and necessary witnesses in his behalf, and it is his intention to subpoena them to give evidence in this cause. The conflicting statements in these affidavits as to tampering with witnesses, and estimates of expense, I pass over. The preponderance of convenience in the defendants' affidavit has been obviously and largely outweighed by the affidavit of the plaintiff, and the rule for a change of:

venue must be discharged, the plaintiff, however, entering into a rule to make the several admissions on the terms which he has proffered, the terms of the rule to be settled by me or by another Judge, if the parties cannot agree on them, and the plaintiff's costs on this motion to be reserved.

This decision was appealed from and argued before the Court in *banc* this December Term, 1876-7.

WILKINS, J., now (Feb. 5th, 1877,) delivered the judgment of the Court:—

This is an appeal from an order made by the Chief Justice at Chambers, discharging an order *nisi* to change the venue in this cause from the County of Kings to the County of Halifax, while requiring the plaintiff to enter into a rule to make several admissions in terms to be settled by a judge, if the parties should be unable to agree upon them, and reserving the question of the plaintiff's costs in respect of the motion. This matter was heard by the full Court, and the Court are of opinion that his Lordship's order at Chambers, appealed from, should be confirmed. All the grounds of appeal stated in the order for leave to appeal, with one exception, resolve themselves into the ordinary ground, which respects the question of the balance of inconvenience. The excepted ground is, in terms, thus expressed: "The learned Chief Justice had no power or jurisdiction, without the consent of both parties, to make an order for plaintiff to admit certain evidence without calling witnesses, in order to reduce the inconvenience of trying the cause at Kentville, and particularly, without giving the defendants an opportunity to agree to admit a large portion of plaintiff's evidence without calling witnesses, and thus make it much more convenient to try the cause in Halifax." After hearing the arguments of defendants' Counsel in support of this last mentioned ground, we are of opinion that, in view of the practice of the Court, and of the principle and reason of the thing, it can not be sustained. Had the objection of the conditions imposed on the plaintiff proceeded from him, there might have been some reason for considering it; but obviously, the defendants could have no interest in making it, unless on the mere ground that they had not had the oppor-

ity referred to by them in the particular ground of appeal just noticed. With regard to that, it is sufficient to serve, that they do not appear to have signified a desire to have such opportunity. As regards the question of the preponderance of inconvenience, after carefully considering the facts in connection with the pleadings, and the arguments in relation to them, we are of opinion that the conclusion arrived at on that point by the Chief Justice was correct. We would concur in that view of the case, even if a feature of it, singled out of the pleadings, and which is to be noticed, were left out of our consideration. It was, of course, for the defendants, in asking to interfere with the common law right of the plaintiff, to lay the venue where he pleased, to establish to the satisfaction of the Court, that he ought to be deprived of that right, in order to permit him to exercise it would entail on the defendants a very much greater inconvenience and expense than the plaintiff would be subjected to if the venue were changed. But the defendants have failed to do. But when we look at the pleadings, we find that the publication of the libellous matter with which the defendants have been charged is justified by the defendants, because that matter was true. The facts as in justification cover a large field of immoralities, indecencies, trespasses, crimes, which are charged upon the plaintiff in the publication in question. When the order appealed from was granted the cause, although at issue, had not been decided. It was, therefore, then uncertain whether on proof of justification by defendants a *prima facie* case of justification might not be made out by them. It was unknown to the plaintiff and would continue to be unknown to him until the trial, what witnesses, or what number of witnesses, would be needed in the witness box by the defendants in support of their pleas of justification. It was, therefore, at the time when the Chief Justice's order was made, simply impossible for the plaintiff to state what witnesses or what number of witnesses should require, at the trial, to meet and oppose the witnesses that the defendants might produce thereat, in order to sustain the justifying pleas. From this view of the state of things that then existed, it would have been manifestly unjust to the plaintiff, as well as unsupported by principle, to have

made absolute, below, the rule *nisi* to change the venue. The order appealed from must be affirmed, and with costs, including the costs at Chambers.

GAMMON v. JODREY.

Defendant agreed, in 1862, to exchange land with J. L. and W. L. He deeded certain lands to them, but, instead of taking deed from them to himself, he had the deed made out in favor of his infant son, R. F. J. This deed was recorded on the day of its execution, though the grantee, R. F. J., was not present at the execution, and there was no evidence that it was ever delivered to him personally. Defendant went into possession at once and continued in possession until action brought. R. F. J., shortly after coming of age, in 1875, executed a deed of the land to plaintiff, who, after making demand of possession, brought an action of ejectment against defendant.

Held, that the deed to R. F. J. conveyed title to him, and that the non-suit ordered on the ground that R. F. J. was out of possession when he deeded the land, defendant holding adversely, could not be sustained.

WILKINS, J., dissenting.

The defendant bought a certain lot of land in 1862, taking a deed in the name of his son, then an infant, eight or nine years old. On the 20th of October, 1875, young Jodrey, the son, came of age, and on the 7th of November, 1875, he sold to the present plaintiff, who, on the 6th of June, 1876, after demand of possession, brought the present action against the father who retained possession. The cause was tried before Mr. Justice WILKINS, at Pictou, in October, 1876, and a non-suit accepted by the plaintiff, with leave to take out a rule *nisi* to set the non-suit aside. The rule was argued before four Judges, January 9th, 1877.

Meagher, in support of the rule.—There is no evidence that the father was in adverse possession when the son sold. The jury should decide that. There is no evidence that the father had any rights in the land; the inference is that the father made a gift of the land to the son. It might be contended that the son was trustee for his father, but then an innocent purchaser without notice of the trust would not be bound by the father's rights. These matters should all have been left to the jury.

Rigby, Q. C., contra.—The plaintiff admits in his evidence

that the defendant was in possession when plaintiff got his deed. There is no evidence that the son was ever on the land at all. A deed was put in as supplementary of evidence taken before a commissioner, and, we contend, improperly received ; the deposition should be complete in itself. There is no evidence that the deed to young Jodrey was ever delivered to him. The possession of the father was adverse to the son. *Mayette v. Hubert*, Thomson, N. S. R., 420.

Henry, in reply.—Anything that shows the intention of the grantor to give effect to his deed is sufficient evidence of delivery. 6 *Simons*, 31 ; 12 *Q. B.*, 699 ; these and a number of other cases, collected in 2 *Cruise*, 336, show how far this principle is carried. The possession of the father cannot be considered adverse, as it might be if he were a stranger. In *Phelan v. Phelan*, James, N.S.R., 184, the possession by a son of part of his father's estate was held, in the absence of evidence to the contrary, as permissive. The defendant went in under a deed to his son, passed under his own instructions, proclaiming that he did not claim the land.

MCDONALD, J., now (February 5th, 1877), delivered the judgment of the Court :—

This is an action of ejectment, tried at Pictou, and it appears by the evidence that the defendant in January, 1862, agreed to exchange lands with *James Langille* and *William F. Langille*. Instead of taking the deed from the *Langilles* to himself, he, for some reason which does not appear, had it executed so as to convey the land from the *Langilles* to his son *Roderick F. Jodrey*, then a young boy of about eight years of age. The deed was registered on the day of its execution, but the evidence shows that the grantee *Roderick* was not present when it was signed, and it does not appear by direct evidence that it was delivered to him personally, though one of the witnesses says that it was signed, sealed, and delivered in his (the witness's) presence. The defendant went into possession of the land and so continued up to the time this action was commenced ; and the grantee, *Roderick F. Jodrey*, after he became of age, on the 7th day of November, 1875, executed a deed of the land for a valuable consideration to the plaintiff,

who, after making a demand of possession, brought this action. A non-suit was moved for on the grounds that no possession passed with the deed to *Roderick*, nor with the deed to the plaintiff, that *Roderick* was out of possession, the defendant holding adversely, at the time of the conveyance from *Roderick* to the plaintiff, and also that there was no proof of the delivery of the deed to *Roderick*, to which non-suit the plaintiff agreed, with leave to move to set it aside. Upon the question of the delivery of the deed to *Roderick*, the evidence as already mentioned shows that the deed was "signed, sealed, and delivered," though the witness does not say to whom delivered, and it is not too much to presume that, as the defendant was acting on behalf of his son, in whose behalf the deed taken, he took delivery of it for his son. *Doe v. d. Garnons v. Knight*, 5 B. & C. 671, and the authorities there cited show, beyond a doubt, that on a delivery even to a stranger for the use and on behalf of the grantee the deed will operate *instantly* and that its operation will not be postponed till after it is delivered over or accepted by the grantee. The case of *Hall v. Bainbridge*, 12 Q. B., 699, was argued, so far as the question of delivery of the deed was concerned, upon the assumption that the document was "signed, sealed, and executed as it purports to be," and the court being authorized to draw all inferences of fact that a jury could properly draw, held that it was a deed delivered by the party executing it to the party producing it, though the attestations were only to the signing and sealing and nothing said about the delivery. I am of opinion that the facts in evidence here would justify a jury in finding that there was a sufficient delivery of the deed.

There is no doubt that the father was in actual possession of the land at the time of the conveyance from the son *Roderick* to the plaintiff; but the question is not one of possession *merely*; it is, whether or not such possession was *adverse* to his son's right at the time. On a careful review of the whole evidence, considering the relationship of father and son existing, the fact that the deed from the *Langilles* was taken by the former in the name and for the benefit of the latter, the recording of it on the day of its date, the son having adopted it and sold the land so soon after he became of age,

and the absence of any evidence of acts or words, showing an adverse holding by the father when the plaintiff's deed was executed, I am of opinion that the question of adverse possession should be submitted to the jury, and that the non-suit ought to be set aside and a new trial granted.

WILKINS, J., read the following dissentient opinion :—

Two questions underlie this inquiry, which demand solution : First—" Was there an execution of the deed from *Langille* and *Langille* to *R. F. Jodrey* when an infant, that transferred a title to him ?" Second—" What was the character of the defendant's possession of the land in question ?" As regards the first question, nobody reading the case of *Exton v. Scott*, 6 Sim. 41, and others of that class can doubt that actual tradition of an executed deed to any person is not essential to its validity ; a contention that the execution of the deed in question was not *absolute* in its nature is excluded by the evidence. I assume then, as the effect of the transaction testified to by old *Langille*—that the title was effectually conveyed to the then infant, *R. F. Jodrey*.

In relation to the second question it becomes absolutely necessary to inquire whether it appears that the deed above referred to ever came into the hands of the defendant. If it did, it must be taken that possession of the land by him at any time before the infant attained full age was a possession for and of the son. In that case he would be, in effect, a trustee for the youth to whom the conveyance was made at his suggestion. If the deed did not come to his hands then, I am not aware of any principle of law that would authorize this court, under the evidence which excludes the notion of an express, actual, trust, to regard the defendant's possession during the period last mentioned as the possession of the son. Now, it is not a proved fact that possession was taken by the defendant for the son, nor that any occurrence, of a fiducial nature, or otherwise, ever took place between the father and the son in relation to the land. For some seven years next previous to the latter attaining full age, he is shown to have been absent from the country, and while in it he lived, not with defendant, but with his mother. It does not appear who

received the deed, at the execution of it, nor out of whose hands it came when proved before old *William Langille*. There is no proof that it was for a moment in the hands of the son, or of any one for him. No evidence was given in whose possession it was at the time of the examination of *Langille*.

Dickson stated that it remained in his possession from the time of the examination until it was produced in Court, and the examination was taken while the Court was sitting. How it got into the possession of *R. F. Jodrey*, (if it ever was in it) is not shown. Old *Langille* said, "the name *Roderick F.* was written in by me, at the time it was executed, at the request of Jacob Jodrey, the defendant." Then he adds, "the deed was given to *R. F. Jodrey* at the request of his father, the defendant." It is certain that he meant "the conveyance was made to the son at the request of the father." That he was not speaking of a tradition of the instrument is perfectly clear; for, first, the son was not present; second, he was an infant of eight years old; third, there is no proof that *William Langille's* eyes ever beheld him after the day of the execution. There is no evidence of the defendant's possession at any time anterior to five years before the trial. Will the proved facts support a contention that his first entry was not an entry in his own right? There is no proof that the defendant was, or considered himself, then, or at any time, a trustee for the son; nor are there proved facts sufficient to raise the inference.

Here, then, I will ask, what grounds exist for submitting to the jury, as a question of fact, the defendant's *intuitus* in entering? The Judge at the trial was not asked to put any question to the jury, and the evidence presented nothing for their consideration. At the execution of the son's deed to the plaintiff this defendant was clearly holding and possessing as of right in himself. This plaintiff so regarded his position when he, on the 27th of May, 1876, before the commencement of the action, caused to be served upon him a written demand of possession of the land. *R. F. Jodrey* had arrived at full age some time before he executed the deed in question. What was this defendant's relation to him and to the land, in the interval between the coming of age and the conveyance?

R. F. Jodrey came of age on the 20th of October, 1875, and this action was commenced on the 6th of June, 1876. The defendant is proved to have been in possession during the whole interval. That he was ever expressly constituted a trustee is not pretended; that he was so by implication of law *during the interval referred to when R. F. Jodrey was of full age with a perfect title*, is equally out of the question. In that interval defendant's possession was of a character that, if continued for twenty years, would by force of the Limitation Act ripen into title, and the entry of the son or any claiming under him would be barred. It was, beyond all question, adverse possession. The recent Statute has abolished "*adverse possession*," as such was previously understood, but it has done so only (see D. & B., 204, 266) *as respects the provisions of the Statute*. It did that professedly to get rid of the experienced difficulty of saying judicially what, in relation to a *limitation* question, was, or was not, in character adverse possession. The common law doctrine, forbidding a transfer of land by him against whom the land was at the time of the conveyance held adversely, until he, being disseised, had first reinvested himself with the possession, remained what it was after the Statute of Limitations, passed *diverso intuitu*, was enacted. We have on several occasions judicially recognized it (see the N. B. case *Doe v. Thompson v. Barnes*, Burton, 426). The Legislature may deem it expedient to abolish it, but, until it does so, we must take care in a decision from this Bench to leave it inviolate. I apprehend it is involved in our present inquiry, and I am unable to perceive that it was necessary for the Judge, *sponte suo*, to submit to the jury any inquiry in relation to it. The point was distinctly taken at the trial, as a ground of non-suit, and it therefore demands decision at our hands. We have decided this very day, much against our moral sentiments, another case on a strict application of the Statute of Limitations. In my apprehension, *law* did not press upon us more strongly in that case than it does in this. In *DesBarres v. Shey* it was expressly decided by this Court that a deed executed by a party against whom another was *then* holding adversely, did not take effect for that reason.— See *Brinley v. Whiting*, 5 Pick., 355, and *Swett et al. v. Poor*

et al., 11 Mass., 549—cases which show a judicial recognition and approval of the doctrine by the Supreme Court of Massachusetts. I think the rule should be discharged.

YOUNG, C. J., said:—

The deed was made fifteen or sixteen years ago, and immediately registered, a fact which is very material here. The registry is evidence of delivery. It is admitted that a child of eight years of age can receive a deed and hold real estate. He may repudiate it after he becomes of age, if he pleases; he is not bound to accept it, until twenty-one. The real difficulty in this case was the possession of the father for some five years. In *Phelan et al. v. Phelan, James' R.*, 184, we have a principle established which I do not find in any American or English cases,—that there can be no possession of a son against his father. Now that a father should consent or desire that a deed be made out to his son in order that he (the father) should acquire title against him before he comes of age, by possession, is ridiculous, I should think. It seems absurd also, to hold that a son cannot have adverse possession against his father, but that the father can against his son. Therefore, I think this case eminently one for a jury. Counsel had better direct their attention to a search for authorities as to the nature of the father's possession.

I am of opinion that the non-suit should be set aside.

SMITH, J., concurred.

CHESLEY v. MURDOCK ET AL.

The proviso in section 41 of cap. 96, Rev. Stat. (4th series), Of Witnesses and Evidence, applies to evidence tendered in causes where the executors or administrators have become parties by suggestion, after the death of the original party; the word "brought" in said proviso, being construed with the word "evidence," immediately preceding, and not with the words, "action or other proceeding."

WILKINS, J., dissenting.

This action was brought against Murdock and Rumsey to recover the price of the produce of an orchard sold by the plaintiff to the defendants. The action was confessed by Murdock, but Rumsey pleaded, and issue was joined by the plaintiff, after which Rumsey died, and the plaintiff, suggesting the death, continued the action against his administrators. On the trial the plaintiff was called for the purpose of proving what took place between himself and the deceased Rumsey, but the evidence was rejected by his Lordship Mr. Justice DESBARRES, before whom the cause was tried at Bridgetown. A verdict was found for defendants, and a rule *nisi* to set it aside on the ground, among others, of the rejection of the plaintiff's evidence was argued at Halifax during the present December term.

Harrington, in support of rule.—The plaintiff's evidence should not have been excluded. The case does not come within the words or the spirit of the statute, *R. S.*, (4 ser.), p. 546. The words of the statute apply to an action brought by or against an executor or administrator. This action is not brought by or against the administrator. There is no similar statute that I can find except in Massachusetts—found in 3 *Mass. Dig.*, 855. That statute shuts out the evidence of the administrator, if a party to the suit. Our act does not go that far. The statute cannot be assumed to be based on the fact of interest, as the doctrine that interest is a ground for excluding evidence has been long abandoned.

It is reasonable to distinguish between the case of an action brought originally against executors and an action brought against a party in his life time and continued against his executors. In the latter case, if the evidence of the defendant is of importance, it can be taken *de bene esse*. The mischief that the law was intended to remedy, was the trumping up of

claims against the estates of dead men. That is not the case here. In re *Maxwell Estate* I objected to evidence of conversations between the widow and the testator, but they were allowed.

There is evidence that Rumsey paid \$20 on the order of the plaintiff.

W. A. Johnston, Q. C., contra.—The count does not aver either request or delivery. It is simply for "orchard produce," and the common counts are struck out. *6 Taunt.*, 192.

It is admitted that the evidence would have to be excluded if the action had originally been brought against the executors. Now the action is, in effect, brought against the executors. The spirit of the act is not simply to prevent the trumping up of actions, but to prevent the trumping up of evidence. A party who makes a parol bargain knows that he may run the risk of the death of the party. He should take a memorandum. Before the act passed in England, the Equity Court refused to receive evidence against a deceased person. That shows the spirit that governs the legislation. The purpose of the act is to prevent evidence from being brought against a man that is not subject to contradiction. This case is within the mischief that the statute was intended to remedy, and the remedy must be applied.

Harrington, in reply.—There is a count for an account stated, to which the excluded evidence would apply.

The original act passed in 1869, contains a clause interpreting the section; *Acts of 1869*, Chap. 7, Sec. 3. That shows that the statute refers to *suits* pending by or against executors or administrators directly.

YOUNG, C. J., now (February 5th, 1877), delivered the judgment of the Court:—

On an attentive consideration of the proviso to section 41 of our Evidence Act, I am unable to acquiesce in the view taken by my Brother WILKINS. I think both the letter and the spirit of the proviso are opposed to it. As regards the first, it depends on the antecedent to and the meaning of the word "brought." Now I hold it to have relation to "evidence," not to "action or suit." The sentence then reads thus: "that

in any proceeding before any Court or any person authorized to hear, receive, and examine evidence brought (that is, produced,) by or against an executor or administrator, none of the other or opposite parties shall be competent to give evidence of any dealings with, or of any acknowledgements made or words spoken by the deceased." The only similar provision we are aware of is to be found in the case of *Palmer v. Kellogg*, 11 Gray, 27, where it is stated that the Massachusetts Act of 1857, Chap. 305, enabling parties to civil actions to be witnesses, contains an exception that when an executor or an administrator is a party to the suit or proceeding, the other party shall not be admitted to testify in his own favor, except as to such acts or contracts as have been done or made since the probate of the will or the appointment of the administrator.

It will be observed that the construction of the section of the Massachusetts Act differs from ours, but the spirit and object of it are the same. It is possible that our legislature never contemplated the case of one of the parties to a suit dying after action brought, leaving his estate exposed to the danger of uncontradicted statements given under oath by the survivor. I think, however, that the language they have used is sufficient to bring such a case within the protection of the Statute. In the case in hand the plaintiff, being called to rebut an alleged conversation between himself and *Rumsey*, gave his own version of it at large, and therefore lost nothing by his rejection in the first instance. It was a case of conflicting evidence, with no great preponderance on either side, and there is no sufficient ground, I think, for disturbing the verdict. The objection to the writ is purely technical and now is of no consequence, as, if a new trial were ordered, it would be amended as a matter of course.

DESBARRES, J., said :—

I have looked carefully into this question and have come to the conclusion that the word "brought" applies to the evidence and not to the action. I therefore concur with my brother the Chief Justice.

SMITH, J., said :—

I think the language of the statute is ambiguous, and that

the ambiguity might have been removed by punctuation. As, however, the clause is susceptible of the interpretation put upon it by the learned Chief Justice, and the merits of the case are with the defendants, I concur in the judgment just pronounced.

WILKINS, J., read the following dissentient opinion :—

If plaintiff's proffered testimony as to what took place between him and the two original defendants, (deceased at the trial) was improperly rejected, we are not in a position to judge of the merits of the case between the present parties to the action. In that case preponderance of evidence is not a question for present consideration. My opinion is that the evidence in question was legally admissible. There should then be a new trial, unless, as was contended at the argument, the form of the plaintiff's writ presents an insuperable obstacle to his proceeding to a second trial—the count for "orchard produce" stating no consideration nor sale nor delivery. If it stood alone, the writ would probably be held bad on motion in arrest of judgment; but it does not stand alone, and, as was argued at the trial, it is impossible to say that the evidence of the plaintiff might not have supported the count for an account stated.

Although the plaintiff declined leave to amend at the trial on the terms of submitting to an adjournment, I am not aware of any rule of law or mode of practice that would prevent this Court or a Presiding Judge from now or hereafter granting leave to the plaintiff to amend his writ, on proper conditions, if substantial justice requires that we should order a new trial.

He has not in effect had a trial at all if his evidence was improperly excluded. We come then to the question, "was the exclusion of it, under the circumstances, necessitated by the provisions of the Statute in question?" (Chap. 96 of the Revised Statutes, proviso of Section 41.) They are, so far as I know, peculiar (so far at least as British legislation is concerned,) to this Province. The policy that dictated them, from the very circumstance of that peculiarity, will be differently regarded by different minds. That of course is not a

subject of inquiry with us, so far as the letter or the clear spirit of the existing legislation extends. Beyond that, it is our duty to institute an unrestricted inquiry into the whole matter of the particular legislation. The effect of it was and is to deprive a subject of a right that existed at the time of the enactment in question. The language therefore of the proviso must be construed strictly. So construed, it does not, in my opinion, embrace the case which is before us, viz : that of the trial of an issue joined in an action in this Court *brought* by a living man against a living man.

As regards any question of competency to give evidence in that case, the proviso affords no inference whatever of the intention of the Legislature. It speaks only of such competency in relation to a case which is not this case,—the case of the trial of an issue joined in an action *brought* by or against *the Executor or Administrator of a deceased person*.

In regard to the construction of this proviso, “brought” is an emphatic word—that can only mean “commenced” or “instituted.” In the sentence in which it occurs, it relates to the antecedent words “*any suit, action, or other proceeding in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence.*” We may speculate, and we may think it probable that the Legislature contemplated that the proviso should operate on the particular case, but an intention that it should do so is not manifested, and to give that effect to the language would be impossible *without importing words which have not been used*.

That we ought not to do, if we could, as a matter of discretion in this case, because this plaintiff sued out his writ, knowing it may be that his own testimony, which the law permitted him to give *inter vivos*, was necessary to sustain his case. Naturally he would not contemplate the contingency of the death, still less that of the double death that ensued. We could not import words, if we would, without disregarding the rules of statutable construction. They will be found, and applicable to the case, at pages 199 *et seq.* of *Potter's Dwarria*. (and see the notes.) I find it impossible to view the word “evidence” in the light in which the learned Chief Justice

regards it. To my mind it is too clear for argument, that that word must be read as forming one sentence with all the other words between the fifth "or" in the proviso and the word "brought," and, excluding the word "brought," be read thus: "before any person having by law or by consent of parties authority to hear, receive and examine evidence." So read, the words are descriptive of one of the two authorities of a judicial character contemplated by the Legislature before whom inquiries might arise. The judicial authority of an arbitrator is a familiar illustration of it. The very phraseology, word for word, is found in the English Statute, 6 & 7 Vic., c. 85, and also in the Section of our Statute of which the proviso is a part, and in both cases used in the particular sense that I have named. The word "evidence" has not any connection with the word "brought." What the word "brought" relates to, as its antecedent, is, "any suit, action or other proceeding." "Evidence brought" is not a usual phrase. "*Action brought*" is a phrase of every day use. *Burrill* so uses it.

It can be conclusively shewn that the construction put on the proviso by my learned brethren, from whom I am sorry to differ, can not possibly be the true one. I have spoken of two authorities indicated by the Legislature. They are that one already noticed and, "any Court of Justice." Those two are separated by the disjunctive particle "or." Now adopting, for argument sake, the construction of the majority as to the connection between "evidence" and "brought," let us transpose the words of the proviso, while expressing every word of it, thus,—“Provided that on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action or other proceeding in any Court of Justice, or” (reading the other part of the alternative referring to "authority" as the majority read it) "before any person having by law or by consent of parties authority to hear, receive and examine evidence brought by or against the Executor or Administrator of a deceased person ;" then follow these words—"it shall not be competent hereafter for any *other of the parties to such* action, or the wife of any *such* party, to give evidence on behalf of *such* party," &c., &c.

Here let the question be asked, first—"What is meant by 'other of the parties?'" Second—What is meant by "*such action*" or by "*such party*?" and we perceive at once, that, connecting the word "evidence" with the words "brought by or against the executor or administrator of a deceased person," the preceding words of the proviso furnish no answer to those questions, seeing that *no action and no parties to an action are indicated*. Thus we have a *reductio ad absurdum*. We have this antecedent phraseology, viz: "*Evidence brought by or against the executor or administrator of a deceased person,*" but no mention is made of any *action* brought by or against the executor or administrator of a deceased person.

On the contrary, if the construction of the dissentient Judge be adopted, and the words "brought by or against the executor or administrator of a deceased person," be read as connected together, and that sentence be viewed as having its antecedent in the words, "*suit, action or other proceeding,*" then the questions are sensibly answered, and no absurdity results.

"Provided that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any *Court of Justice*; OR (on the trial of any issue joined or of any matter or question or on any enquiry arising in any suit, action or other proceeding), before *any person* having by law or by consent of parties authority to hear, receive and examine *evidence brought* by or against the executors or administrators of a deceased person,—it shall not be competent hereafter for any other of the *parties to such action*, or the wife of any such party, to give evidence," &c., &c. What action? What parties? Here we have as complete a *reductio ad absurdum* as was ever witnessed. No action is before indicated, and therefore no parties to an action.

This is an inevitable consequence of reading "*evidence brought,*" instead of "*action brought.*" Make "*brought*" refer to "*action*;" then the proviso (which is insensible in the construction of the majority), has a sensible application given to every word of it.

In the last case, if the question be, "what action," "what parties," are meant by the words "parties to such action," the

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answer is, "a suit, action or other proceeding brought by or against the executors or administrators of a deceased person. The words, "any person having by law or consent of parties, authority to hear and receive evidence," are the very words of the English Act, and actually occur as descriptive of an authority to *hear* evidence in the very action which precedes the proviso. That satisfies the words and shews the absurdity of tacking on "brought" to "evidence," instead of referring "brought" to "action."

I am of opinion that the rule should be made absolute.

TRUSTEES OF SCHOOL SECTION 16 v. CAMERON.

Two of the defendants and another were duly elected school trustees in October, 1873. In December, the defendants, without the concurrence of the third trustee, removed the school house from its then site. No school was maintained during the winter, though efforts were made by the trustees to maintain one. In June 1874, the Commissioners of Schools for the district including section 16 dismissed the three trustees, and appointed three others, assuming the power to do so under Chap. 32, R. S., Sec. 20. The newly appointed trustees brought an action of trespass against the two trustees who had removed the school house and their servants for such removal.

Held, that, under the circumstances, the Commissioners had no right to dismiss the original trustees and appoint others, and that even if their appointees had been legally appointed trustees, no action would lie at their suit against defendants for acts committed during their term of office.

This is an action of trespass brought by the plaintiffs against the defendants for removing a school house under the following circumstances:—The two defendants, with another, were elected trustees of school section 16, in the County of Pictou in October, 1873. The defendants undertook, without the authority of the Board of School Commissioners and the third trustee dissenting, to remove the school house from the site on which it stood to another place, which is the trespass complained of, and which was performed during their tenure of office as such trustees. They were afterwards removed by the Board of School Commissioners, and new trustees appointed, (the legality of the appointment being questioned),

and the new trustees brought action against the two former trustees, which was tried before McDONALD, J., at Pictou, in October, 1876, and a verdict found for the plaintiffs for \$100. A rule taken to set the verdict aside was argued in December, 1876, before YOUNG, C.J., DESBARRES, WILKINS, and SMITH, J. J.

Graham, in support of the rule.—The plaintiffs were not in possession at the time of the alleged trespass. *Secondly*, the defendants were in possession. *Thirdly*, the trustees had a right under the Statute to change the site. *Fourthly*, they are not answerable to the plaintiffs. Cites *R. S.*, Cap. 32, Sec. 20. The evidence of notice to the trustees should not have been received. Cites *Education Manual*, p. 17, note to sec. 24,—requiring a notice to the trustees, which was not given in this case. There was nothing in the conduct of the trustees to warrant their removal.

McDonald, Q. C., contra.—The action of the School Commissioners in removing the trustees is conclusive and cannot be reviewed here incidentally, but must be brought up by *certiorari* or otherwise formally. Cites *Chisholm v. McDonald*, Thomson, 367; also *R. S.*, Cap. 32, Sec. 20, giving the Board of Commissioners authority to appoint trustees in case those elected neglect or refuse to serve. The Court must assume that the trustees were rightly dismissed. The only question is whether they had the power to appoint the new trustees, and, if so, the Court must assume that they exercised the power rightly. It is not for us to shew anything as to the facts that necessitated the appointment of the new trustees.

The defendants here did an act *ultra vires*. A corporate body composed of three individuals can only act by the deliberate resolution of the whole body. The individuals as such cannot exercise the authorities of the corporation. To evidence the corporate act, there must be a minute of a resolution. The act done here was not a corporate act, but simply the act of two persons who happened to be members of the corporation at that time; Cites Sec. 30, Sub-sec. 4. This site being ratified by the school section, could not be changed, but by the resolution of the Trustees as a corporate body and with the sanction of the three nearest school commissioners, of which there is no pretence of evidence.

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Sec. 28 of Chap. 32, R. S., makes the trustees a body corporate. Sec. 30 sub-Sec. 2, makes it their duty to take possession of and hold, as a corporation, the property of the section. Section 31 does not obviate the necessity of having the sanction of the nearest commissioners before altering the site. The only question therefore is, whether the corporation can bring an action against a trespasser. Suppose a single one of the trustees broke into the school house and committed a trespass, could not the corporate body of the trustees bring an action against the individual? If not there is no remedy. The fact of the trespasser being a member of the corporation does not make the case any different from what it would be if he were an outsider. I maintain that if two out of three trustees should, as individuals, commit an unlawful act affecting the corporate property, the remaining one would, in the name of the corporation, bring an action against him; but I need not go that far. Neither does it make any difference that the action is brought for a trespass committed before the plaintiffs became trustees, for the action is brought by the corporate body and not by the individuals. The corporation is perpetual. The possession was in the trustees as a corporation and was one continuing possession, no matter who the individual trustee might be; *Brice on Ultra Vires*, 167. The corporation and the members of the corporation are two distinct entities. If the individual character is to govern, it is the secretary that is in possession.

The defendants justify as trustees. That puts the necessity upon them of showing that they acted as trustees, of which there is no evidence.

Cites *2 Waterman on Trespass*, 431, 432, (note); *24 Pick-* 304; *Abbott on Corporations*, 717; *Id.*, 526; *34 Eng. L. & Eq.*—*Rep.*, 1; *Angell & Ames on Corporations*, §238, §239; *10 L. R. Exch.*, 92; *Mill v. Hawker*, 9 L. R., Exch., 317. The act of removing the school house even partially with the intention of removing it entirely was *ultra vires*. Cites *22 Pick.*, 102; *3 Esp.*, 278; *1 East*, 555; *3 Mass. Dig.*, 718.

Graham, in reply.—It is admitted here that the two defendants were trustees at the time the act was committed.

not essential at all that there should be a resolution. No trustees were the majority. The mistake here is the supposition that the trustees are a corporation. The essence of a corporation is to have perpetual succession and appointees to fill vacancies. These do not apply to a Board of Commissioners. The defendants, by virtue of their appointment, own the land. There is no succession. They could not rely on the seisin of their predecessors. The Act vests it in them after appointment. The sanction of commissioners is required for the change of the site, but only for the original location of the site.

The trustees are simply a *quasi* corporation; 7 *Mass. R.*, 187. *Angell & Ames on Corporations*, § 629, note, § 630. The maxim, *omnia rite acta*, applies to the acts of the trustees as well as to those of the commissioners.

It cannot be a continued corporation here. The Statute provides for the filling of vacancies. What becomes of the corporation when such vacancies occur. Could the corporation at any time have brought an action against the individuals? Who could bring the action, the majority having concurred in the

See *Broom's L. M.*, 953, as to the presumption that the commissioners acted regularly. There is no refusal to act or neglect of duty proved. The regular meeting of the Commissioners is in May. This substitution of trustees was made in June, and there is no evidence of a special meeting having been called. It has been argued that the action of the Commissioners cannot be assailed incidentally, but must be by *certiorari*. There is no *certiorari* here. That process applies to judicial acts; Cites *Angell & Ames on Corporations*, to show that the defendants were a corporate body and could only be sued in their corporate capacity. *Angell & Ames*, § 768 and § 23; 2 *Kent*, 278.

BARRIS, J., now (March 6th, 1877,) delivered the judgment of the Court:

The plaintiffs, representing themselves to be the Trustees of the Canal Section, No. 16, in the S. District of Pictou, have brought this action against the defendants for breaking and

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entering their close as such Trustees, and destroying the foundation walls of the School House of that section thereon erected, and removing and carrying away the same from its lawful site and converting it to their own use. The plaintiffs' right of property in the School House as such Trustees, as well as their possession, is denied by the defendants, who, by their seventh plea, say that at the time the action was brought the two defendants, *James Cameron* and *John A. Cameron*, and one *Duncan McDonald*, who is not sued, were the Trustees of School Section, No. 16, South District of Pictou, duly elected and appointed under the Statute in that behalf, and that the said land was the freehold, and the School House, Walls and Buildings were the property of said *James Cameron*, *John A. Cameron* and *Duncan McDonald*, as such Trustees, under the Statute in that behalf; and because it was deemed desirable to change the site of said School House, they purchased another site for said School House, and having lawful power, proceeded to change the site of the School House, and the two defendants, *James Cameron* and *John A. Cameron*, as such Trustees, in their own right, and the defendant, *Nathan Cameron*, as their servant, and by their command, entered upon the said close, and with teams moved the School House a short distance from the place it then occupied, toward the site purchased and accepted, &c., which were the alleged grievances. By the eighth plea the defendants alleged that the plaintiffs were never duly appointed Trustees of said School Section, No. 16, and were not such Trustees at the time of the alleged trespasses, or at the time the action was brought, or at any other time, and did not own or take possession of or hold, under the Statute, said lands and property, and that the said *James Cameron*, *John A. Cameron* and *Duncan McDonald* were at the time. &c., Trustees of the said School Section, No. 16, duly elected and appointed under the Statute, and a body corporate for the purposes mentioned in the Statute, &c., and that the land was the freehold of *James Cameron*, *John A. Cameron* and *Duncan McDonald* as such Trustees, &c., together with the School House, &c.

A verdict having been found upon the issues raised by these pleas in favor of the plaintiffs, we are now called upon to de-

cide whether in view of the law and the evidence in this case it can be sustained. The fact of the removal of the school house in question by the defendants a few feet from the site on which it stood, with the avowed intention of removing it still further and placing it on another and different site a mile or more beyond the old, having been clearly proved, the main question for our consideration is, whether the plaintiffs or defendants at the time the acts complained of were committed were the duly appointed trustees of section No. 16. If the plaintiffs were then the legally constituted trustees for that section, having under the law the right of property in as well as the possession of the school house, the defendants were trespassers, and in that case the verdict ought to be upheld; but if the acts complained of were committed before the plaintiffs were appointed, and while the defendants were acting as trustees, duly elected and chosen for a time which had not then expired, it follows that the plaintiffs, having, at the time, neither title nor possession, were not in a position to maintain the present action. Now it appears from the Judge's report that at an annual school meeting for Section No. 16, held in October, 1873, *Duncan McDonald*, *James Cameron* and *John A. Cameron* were appointed trustees for that section for the ensuing year, and that they assumed the duties of that office, but from some cause or other not explained, there was no school kept in the school house, though a teacher was engaged and efforts were made to establish one. In December, 1873, the defendants, *James Cameron* and *John A. Cameron*, caused the school house to be removed a few feet from the site on which it was at first placed; this act of removal it appears was effected without the concurrence of *Duncan McDonald*, who expressed his disapprobation of it, but he nevertheless continued to act with his co-trustees until June, 1874, when they were all dismissed by the Commissioners of Schools and the plaintiffs appointed in their stead.

Whether the Commissioners of Schools had the power which they exercised of dismissing the defendants and their co-trustee from the offices conferred on them by the rate payers of the district and appointing the plaintiffs in their stead, under the circumstances of the case as I understand them, is, I think, very

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questionable. They have the power, under Section 20, Chap. 32, R. S., to appoint trustees in certain cases, but the present case does not appear to me to fall within the scope of the authority given to them by that section, which declares that, "where any section at the time fixed for the annual meeting fails to elect three trustees, or to fill the vacancy occurring in the trusteeships, or vacancies occurring from other causes, the trustee or trustees shall be appointed on the written requisition of seven ratepayers in the section, by the Commissioners of Schools for the district in which the school house is situate, or in which a majority of the ratepayers of the section reside, and where any trustee or trustees have been elected and refuse to act, or shall neglect the performance of duty for twenty days after such election, the Board of Commissioners shall appoint a trustee or trustees in place of the person or persons refusing to act." There can be no doubt from the evidence in this case that the two defendants, *James Cameron* and *John A. Cameron*, together with *Duncan McDonald*, were legally appointed trustees for section No. 16, and as no vacancy had occurred and no proof was produced (unless the exhibits referred to in the Judge's report, with which we have not been furnished, contained such proof), of any refusal or neglect by and on the part of the trustees, to act or perform their duties as such, it is difficult to understand upon what ground they were dismissed. My own opinion is that their dismissal was *ultra vires*.

But assuming that there was good ground for dismissing these persons, and that the Commissioners of Schools had authority, under the law, to appoint the plaintiffs as trustees in their places, as they did, another question presents itself for our consideration, and that is, whether the plaintiffs can maintain an action of trespass against the defendants for an act committed on property of which they were, at the time, in the lawful and exclusive possession as Trustees of School Section, No. 16,—in other words for an action committed six months before they, the plaintiffs, were appointed to the office of School Trustees. This, in my mind, strikes at the very foundation of this suit and is, of itself, a fatal objection to it, as it is clear that trespass cannot be maintained against the de-

fendants for the removal of the school house, while they were in the lawful possession of it as Trustees. It is possible the defendants may have acted indiscreetly in attempting to remove the building from the site on which it stood toward that contemplated, but it must be borne in mind that they were public officers, and if they acted in good faith, though wrong, they cannot be treated as trespassers and held personally responsible for what they did. It is true, several of the ratepayers protested against the removal of this building, but there were others who assisted the defendants in removing it from the old site towards the new. This shows that there was a difference of opinion in the school section as to the site on which the school house ought to be placed, but we have no means of knowing whether a majority of the ratepayers were for or against its removal.

It is clear, however, that there were several who concurred with the trustees, and that the act of wrong was not attributable to them. Looking at all the circumstances of the case and applying the same principle of law by which all suits of a similar nature must necessarily be governed, it seems to me impossible to sustain the verdict which the jury have found, and therefore, I think, the rule for setting it aside must be made absolute.

EXCHANGE BANK v. BROWN.

Demurrer to declaration by obligee on bond assigned to co-sureties who had paid defendant's debt, over-ruled.

This was a demurrer to the declaration of plaintiff. The action was brought by the bank on behalf of one Ryerson and the administrators of one Rogers, to recover money paid by them to the Bank, as sureties, on a bond made by the defendants, Ryerson and Rogers, in consideration of advances to be

made in the form of an open cash account to a certain amount. The declaration set out these facts and that the bond had been assigned to Ryerson in trust for himself and the administrators of Rogers. Defendants demurred, and the demurrer was argued February 10th, 1877, before YOUNG, C. J., and WILKINS, DESBARRES and JAMES, JJ.

Rigby, Q. C., in support of demurrer.—Refers to the 370th section of chap. 94, R. S., respecting the assignment of securities to sureties. The bond in this case, signed by Brown, Ryerson and the other, was not a security for the debt; it was the debt. The Act refers to securities from the debtor held by the original creditor, to which the sureties are entitled.

Weatherbe, Q. C., (with whom were Henry and Graham), contra.—Cites 9 C. B., N. S., 544; L. R., 5 Eq., 210, 3 F. & F., 963.

YOUNG, C. J., now (March 6th, 1877), delivered the judgment of the Court:—

This is a demurrer to the declaration, admitting, of course, the facts and circumstances set forth therein, and questioning their legal effect upon various grounds. The defendant, *George S. Brown*, in 1869, opened a cash account with the Bank for the sum of \$2500, having executed a bond therefor, with *Ryerson* and *Rogers* as his sureties. \$2498.19, principal money, having been advanced by the Bank, the defendant, upon request, neglected and refused to pay it. Then it is suggested that, *Rogers* having died intestate, and administration granted of his estate, the Bank demanded payment from the administrators and from *Ryerson*, whereupon the Bank, being paid in full, with interest, assigned the bond to *Ryerson* in trust for himself and the estate of *Rogers*, in equal moieties, and the action is brought at the instance of *Ryerson* for indemnification and re-imbursement of the advances made.

This was done, not, as it would seem to have been at first suggested, under sections 355 to 357, for the assignment of choses in action, but under section 370 of our Practice Act, chap. 94, which is a transcript from the Imperial Act, 19 and 20 Vic., chap. 97, sec. 5, introducing a new and remedial clause

into the practice of the Courts, and extending to co-debtors, being co-defendants, as well as to sureties.

In *Batchellor v. Lawrence*, 9 C. B., N. S., 543, the defendants, having recovered judgment in a previous action against the now plaintiff and nine other persons, issued an execution thereon, and the plaintiff paid the amount, on which it was held that he was entitled to an assignment of the judgment, in order to obtain from the other defendants therein their just proportions. "This," said ERLE, C. J., "he is entitled to, "whether the judgment shall or shall not be deemed at law "to have been satisfied by payment of the debt." The very object of the Statute was to give the co-surety or co-debtor a prompt and efficacious remedy for obtaining contribution. The defendants were therefore held liable in this action for refusing to assign the judgment which had been paid to them.

In *DeWolf v. Lindsell*, L. R., 5 Eq., 209, DeWolf, surety for Cochran in a bond, having paid the debt, was held to be entitled to have the debt assigned to him, and to stand in the place of the creditor, and to use the name of the creditor in any action or proceeding at law or in equity, in order to obtain indemnification for the advances he had made.

These cases are decisive of the point in question, and the assignment to *Ryerson* and the plaintiff's writ being clearly authorised by the Statute, the demurrer is overruled with costs.

FRASER ET AL. v. WALLACE.

Mrs. M. received from plaintiffs certain articles of furniture, under the following written memorandum, signed by her, "Received from Messrs. F. & Son the following articles of furniture, for which I am to pay, &c. The said furniture to remain the property of W. F. & Son, till paid for in full, and in the event of non-payment, the said W. F. & Son can take the furniture back."

The defendant, who was Mrs. M.'s landlord, before the furniture was delivered, signed the following written memorandum—"The bearer, Mrs. M., being about to purchase some furniture from W. F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be provided by W. F. & Son, for any rent that may become due."

Held, that defendant was estopped from distraining on the furniture so supplied.

This was an action of replevin brought to recover certain goods delivered to one Mrs. Maurice, and distrained by the de-

fendant for rent due him by Mrs. Maurice. The goods were delivered to Mrs. Maurice upon her signing an agreement to pay for them so much per month, and that they were to be the property of plaintiffs till paid for, and upon her producing an undertaking from defendant not to distrain the goods for any rent that might accrue, until they were paid for. The cause was tried in Halifax, and a verdict found for plaintiffs. A rule *nisi* to set it aside was argued during the December Term, 1876.

Wallace, in support of rule.—The replication was improperly admitted into the issue, not having been pleaded for more than a year after the plea, and not being pleaded by leave of the Court or a Judge. *Ch. Arch. Pr.*, 306.

The Judge misdirected the jury in not bringing to their notice the pleadings in the cause. The defendant called no witnesses, relying upon the admissions contained in the plaintiff's replication. He states in his report of his charge that he explained the pleadings, but does not say how he explained them. That is not the correct way to report a charge. If the jury found against the admissions of the pleadings, it is to be assumed that his Lordship misdirected them in that respect. He misdirected them in telling them that the defendant had "guaranteed" the plaintiffs that the goods would not be distrained. He left the jury nothing to do, telling them they would be justified in finding a verdict for plaintiffs. *36 L. & E. R.*, 43.

The replication sets up fraud as a defence or answer to the defendant's avowry, but there is no evidence of fraud. It is impossible that the party signing the undertaking he is required to sign, should be guilty of fraud. This replication contains the whole case for plaintiffs. The paper upon which plaintiff relies is not a guarantee to Fraser, that defendant would not distrain the goods, but an agreement with Mrs. Maurice. The plaintiff has not shewn or even pleaded that he "sold" the goods to Mrs. Maurice, which was the condition of defendant's agreement. Fraser had no right under the laws of this country to make such a bargain as he did with Mrs. Maurice, the moment he delivered the goods to her, the property passed out

of him, and he could not replevy. If it was not a complete sale, then the condition of the defendant's agreement failed.

Coombes, contra.—The goods in question were never liable to distress, independently of the defendant's agreement. Again, that very agreement alleges that the rent was guaranteed, and stops the defendant from setting up a distress.

Wallace in reply.—The learned Judge read to the jury a written judgment of the Equity Judge, given in an entirely different case. Cites *Hilliard on New Trials*, 271, 280, as to a judge directing a jury for whom they shall find a verdict. Such an agreement as that between Fraser and Mrs. Maurice is not legal here or in England, though it might be in the United States. Property passes the moment of delivery. Plaintiff's only action here, if any, is an action on the case, which would give him all the remedy he required. *Benjamin on Sales*, 33, 227, 452, 461. To give Fraser any property in these goods he should have got and filed a chattel mortgage. Cites *Woodfall's Landlord & Tenant*, 358, 992; *Addison on Contracts*, 199, 435, 445, 455; 4 C. B., 837; 17 C. B., N. S., 132; 10 Bingham, 482; *Parsons on Contracts*, 435, 440-1; 1 *Best & Smith*, 393; *Saunders on Pleading & Ev.*, 192; *Addison*, 179, 190-1-2, 230. There was no proof of the plaintiffs jointly owning these goods.

McDONALD, J., now (March 6th, 1877), delivered the judgment of the Court:

The defendant in this case was the owner of a house which he let to one Mrs. Maurice, to be used as a boarding house; and, as it was not furnished, she applied to the plaintiffs to provide her with furniture. They, however, declined to sell her the furniture unconditionally, but gave her a number of articles upon the terms mentioned in the following paper writing, signed by her:—

“HALIFAX, N. S., June 23rd, 1874.

“Received from Messrs. Fraser & Son the following articles
“of furniture, for which I am to pay two hundred and twenty
“dollars and twenty-five cents or more, in monthly payments
“of twenty dollars each month from date. The said furni-

"ture to remain the property of W. Fraser & Son, till
 "for in full, and in the event of non-payment month
 "said W. Fraser & Son can take the furniture back."

It was contended at the argument that the plaintiff
 ing parted with the possession of the property under
 agreement, could not retake it on breach of the condition.
 such contention appears to me to be entirely without foundation.
 The agreement gives the plaintiffs the right to the goods in case the condition was not complied with.
Mrs. Maurice after having signed that agreement, could not
 recover against the plaintiffs for retaking them after.
Mrs. Maurice, however, does not complain in this case,
 will presently see by what right the defendant sets up
 equity in her. *Addison*, in his work on contracts, particularly
 treating of conditional or defeasible sales, after stating
 cases where there is no sale till the condition is complied with,
 says: "In these cases the right of property in the
 "thing sold passes, subject to a condition. If the condition
 "fulfilled or waived, the sale becomes an absolute one
 "is not fulfilled or waived, the party in whose favour
 "whose protection the condition was imposed is entitled
 "repudiate the contract and return the subject matter
 "sale and recover the price."

Where a mare was sold on the terms that if she
 with foal she was to be returned, and the mare produced
 foal, it was held that the vendor had a right to have the
 mare returned to him; *Williams v. Burgess*, 10 Ad.
 499. The American books contain numerous cases where
 much farther than the plaintiff in this case is required
 to make out his case. *Hilliard on Sales*, at page 4
 that the "mere delivery of property, under a conditional
 "contract for future sale, does not change it from an executory
 "into an executed agreement, and thus vest an immediate
 "in the proposed buyer: thus, when A agreed with B,
 "should take his sheep and depasture them for a certain time
 "and, if at the end of that time he paid a certain sum
 "the sheep for his property, it was held that this was
 "and that A might, before the day, make a valid sale
 "*Reed v. Upton*, 10 Pick., 524"; again he says, "when the

"contract for a sale *in futuro* or on performance of a condition
"and a further stipulation that in the mean time the vendee
"shall have the possession, for a particular purpose, and he
"takes possession accordingly, the sale is not executed nor
"the property changed till the act is done or the condition
"performed, although the purchaser gave his note at the time,
"which note was afterwards partly paid." At page 23, he says
that possession delivered on condition till payment should be
made does not pass the property, and the part payment made
will be forfeited, if the agreement be not fulfilled. These au-
thorities go much further than the plaintiff here is required
to go, and it is clear that no legal question could arise as be-
tween *Mrs. Maurice* and the plaintiff if, without the distress
being made, the latter had retaken the property on breach of
the condition. But the plaintiff did not part with the pos-
session of the property till he was assured that his remedy
under his agreement with *Mrs. Maurice* would not be defeat-
ed by a distress for rent at the instance of the landlord, and
the result was that the defendant, who was such landlord,
signed a paper, which was delivered to the plaintiff, in these
words: "The bearer, *Mrs. Maurice*, being about to purchase
some furniture from *Wm. Fraser & Son*, and my rent being
guaranteed, I hereby agree not to take the furniture so to be
provided by *Wm. Fraser & Son*, for any rent that may be-
come due. 23rd June, 1874. *Sgd. T. J. Wallace.*"

The evidence is clear that if *Mr. Wallace* had not given
that undertaking, the plaintiff would not have delivered the
goods to *Mrs. Maurice* at all, but the defendant, disregarding
his written undertaking, did levy upon the furniture, and the
plaintiff having replevied it got the verdict which is now sought
to be set aside. The objection to the issue roll taken at the
argument and trial, is without any foundation whatever, so
far as the papers before us shew. To the plea of justification
under the distress for rent, the plaintiff replied the fact of the
defendant's representation of his rent having been guaranteed,
and his undertaking not to levy upon the furniture, and I
have no doubt that the evidence on that point was well re-
ceived. Indeed it is laid down and with good reason that it
is not necessary at all to plead estoppel *in pais*. *Bullen and*

Leake, Tit. Estoppel ; Taylor on Evidence, 107. It is a clear principle of law that no one can, by first representing a certain state of facts to exist, induce another to change his position to his disadvantage, and afterwards, when it suits his interests to represent a different state of facts, deny the truth of his first representation. He is estopped from doing so. If *Mr. Wallace* did not sign the paper in question designedly to induce the plaintiff to give *Mrs. Maurice* the furniture, I have no doubt that the legal effect of the paper which he signed is the same as if he did. *Freeman v. Cooke*, 6 D. & L., 187; 2 *Exch.*, 654. After having been applied to by the son of *Wm. Fraser*, one of the plaintiffs, to ascertain if the signature was his, he told him it was, and thus he set any doubt at rest. (*Beaufort v. Neeld*, 12 Cl. & Fin. 248, *Taylor on Evidence*, 749). Under the evidence it is impossible to conclude that the plaintiffs would have parted with the possession of their goods, but for the defendant's written paper, and it would be a very great perversion of justice, if, under such circumstances, they were to lose their just rights and the defendant profited by a breach of his undertaking. It is useless to argue that there was no value or consideration for *Mr. Wallace's* undertaking. The question does not arise in cases of estoppel like this. There is a consideration other than mere dollars and cents which the law recognizes in transactions of this kind, namely, the obligation to speak and act in accordance with truth. *Taylor on Ev.* 105.

The rule *nisi* must be discharged with costs.

HARRINGTON v. WITTER.

Held, unnecessary to allege, in proceeding for a penalty under section 92 of the Insolvent Act of 1869, and section 136 of the Insolvent Act of 1875, that the defendant was insolvent within the meaning of the Act.

This was a demurrer to a declaration for a penalty under section 92 of the Insolvent Act of 1869, and section 136 of the Act of 1875. The demurrer was argued during the December Term, 1876.

Meagher, in support of demurrer.—The acts declared on here are not within the Act, unless there has been an assignment under the Act or an attachment. The party must be actually in insolvency. Cites *Bligh v. Pitts*;* *Gastonguay v. Rogers*;* 29 U. C., Q. B., 338; 3 B. & C., 186.

In *Bank B. N. A. v. Budd*,* the court decided that because the declaration did not contain the words "contrary to the form of the statute" it was bad.

This is practically an indictment, and the party must bring the case within the provisions of the statute and allege everything necessary to bring himself so within it.

Cites 2 *Hawkins, P. C.*, 25, fol. 116, 117; 4 B. & Ad. 345; *Ryan v. Massy, Fisher*, 1008; *Mansel on Demurrer* 66; *Sedgwick on Construction of Statutes* 91, 93; *Potter's Dwarries*, 146, 150; 1 T. R., 144.

Sedgwick, contra.—The declaration alleges that the defendant is a trader. The Insolvent Act states that this act shall apply to traders, so that, even if the contention is correct that we must bring ourselves with the terms of the act, we have complied. It is not necessary that an assignment should have been made. Under sections 131 & 133 and others, the allegation of an assignment would be necessary, because the assignment determines the offence. Under the section on which these proceedings are taken, the very moment the offence is complete, the proceedings can be taken, and the party to be punished may not be a trader. He may be simply the agent of the trader and so a clergyman or a lawyer. The action can be brought without an assignment having been made at all.

In the case in 4 B. & Ad., the clause under which the action was founded read, "if any *such bankrupt*," so that it was confined to bankrupts. The statute here applies to *any person*, and is not confined to bankrupts. In the case of *Gastonguay v. Rogers*, the prisoner may not have been a trader. He was entitled to discharge if he could not have been shown to have committed some act within the terms of the provincial statute. (WILKINS, J.—There is abundant material in the sec-

* Not reported.

tion to lead to the inference that the Act contemplates the case of an Insolvent charged with fraud). How then would the case of a fraudulent act on the part of an agent be punished?

"The court" means any court of competent jurisdiction! There are no trials in the Probate court within the meaning of the section. There is no such thing as a verdict.

A Judge of the County court has no jurisdiction in insolvency. It is the court itself.

Harrington.—The declaration has quite sufficient in it to bring us within the scope of the Act. The statute provides the form of the declaration. There is one thing by the section that it is necessary to allege, *i. e.*, an action to recover the debt; and we have to allege that he has been guilty of fraud. He is alleged to have been a trader within the meaning of the Act of 1869 and the Act of 1875. The words "contrary to the provisions of the act," &c., are in the declaration.

Assume now that this section applies only to cases where actual insolvency was intended. How can that allegation in the declaration be true that he acted contrary to the provisions of the act, unless he was an insolvent so as to come under the act?

On what principle is it contended that we should have alleged the insolvency. Clearly only because it is necessary in order to bring the party within the section. Now if it can be inferred from the declaration, it is quite sufficient. *33 U. C., Q. B.*, 173; *1 Ch. Cr. L.*, 283, *b.*

(SMITH, J. The section refers to a "creditor," which is defined as referring to a person proving under that act.

JAMES, J.—the word creditor may be defined by the word *credit* used just previously in the same sentence.

SMITH, J. Can you sue the agent for the debt?

Yes. There is no doubt that under the statute you can proceed against the agent. It may be said we must wait for the insolvency of the principal, but what has the insolvency of the principal to do with the fraud of the agent?

Every other section requires the party to have been an insolvent and made an assignment. But this applies to every person, not requiring an assignment to be made. It can make

no possible difference with respect to the moral aspect of the case whether there is an assignment or not.

Contracts made in fraud of creditors are void by sec. 132. 1 *Chitty on Pleading*, 222, 224, 372.

Thompson, in reply.—The act from first to last only applies to insolvents. The title shows that it is an act respecting insolvency. Secondly, the Dominion parliament had no power to adjudicate upon the matter, unless in relation to insolvency. It would be *ultra vires* if it were independent legislation to promote commercial morals. A number of sections are framed not especially confined to Insolvency in terms, but which must necessarily be so confined. *Acts of 1875*, sec. 132.

The mischief to be remedied by the clauses invoked is the purchase by a trader of goods on credit, knowing himself to be insolvent and afterwards going into insolvency. There would be no remedy required if insolvency did not follow. There is nothing in the argument that the action could not be brought against an insolvent.

The legislature has clearly intended to enable us to bring suit against insolvents for fraud. *Edgar's Insolvent Act of 1869*, p. 107, note; 28 *U. C.*, Q. B., 266.

Besides there is nothing to prevent the suing of an insolvent.

Would it not be a great anomaly for a person not in bankruptcy to be sued and charged with fraud, and to attempt to prove fraud and have him punished, when he may have been unable to pay at the time and become amply able afterwards. Suppose he has a large contract on hand, and is unable to pay until he realizes.

Cites *Edgar's Insolvent Act of 1869*, p. 56, to meet contention that creditors would have to wait until maturity of claim before taking proceedings in insolvency.

If sec. 136 has the operation contended for, it applies to persons not insolvent at all. It must be controlled by the general scope of the act and must be taken to be legislation within the powers of the legislature, which it would not be if it applies generally. Being penal, the statute must be construed strictly.

Sedgwick points out the corresponding section in the act of

1866. That act applies only to traders in Lower Canada, and to all persons in Upper Canada. The section there applies in Upper Canada to *all persons*. Those latter words being used in the Act of 1869, which is applicable in the whole to traders only, shows that it was intended in 1869 to widen the application of this section and make it refer to all persons.

Thompson.—It is not the same legislature that passed the two acts ; therefore no inference can be drawn.

WILKINS, J., now (March 6th, 1877,) delivered the judgment of the Court :

I think the demurrer in this case is based on a misconception of the meaning of the statutes in question. It is unnecessary to notice in detail the declaration demurred to. The demurrer admits that defendant is guilty of the fraud and subject to the consequent penalty, as alleged in the declaration, unless it was necessary for the plaintiff to have alleged, as he has not alleged, that the defendant was an insolvent in that sense in which in the demurrer it is contended the plaintiff was bound to represent him. Thus the demurrer rests on the ground that allegations essential to shew the defendant's liability as asserted are omitted from the declaration.

Two questions arise for consideration :—First, what is the true construction of the statute referred to ? Second, what allegations in the declaration were required in the true view of that construction ?

The plaintiff has set out defendant's indebtedness in respect of promissory notes and under the general counts. He has proceeded to assert defendant's fraud and consequent liability to penalties, under section 92 of the Insolvent Act of 1869, and the 136th section of the Insolvent Act of 1875. It is alleged in the declaration that the defendant, when the acts constituting the fraud were done by him, was a trader within the two statutes referred to. The following are the grounds of demurrer stated by defendant :

"And thereupon the defendant, by N. H. Meagher, his attorney, says that the whole of plaintiff's declaration, except the first, second and common counts thereof, is bad in substance for the following reasons : First—Because there is no allegation

therein that said defendant ever was or became an Insolvent or made an assignment under the Insolvent Act of 1869, and the Insolvent Act of 1875, or either of them, or that his estate was, or is, or had been placed in compulsory liquidation under said acts or any of them, or under any other act, or that he is subject to the provisions of said acts or either of them.

“Second—Because the said Insolvent Acts of 1869 and 1875, which are the only statutes referred to in said declaration, are not, nor is either of them, a statute or statutes of general or universal application and their provisions can only be invoked and only apply in cases where the party proceeded against is insolvent and has made an assignment, or his estate has been placed in compulsory liquidation thereunder, neither of which is alleged in said declaration.

“Third—Because said Acts of 1869 and 1875 only apply where proceedings are or have been taken under it, and there is no allegation in said part of said declaration herein demurred to or any part of said declaration, that any proceedings have been taken under said act against said defendant.

“Fourth—Because there is no allegation in said declaration which brings said defendant within the purview and operation of said Insolvent Acts of 1869 and 1875, or either of them, or the statute in such case made and provided.

“Fifth—Because the said part of said declaration does not disclose any cause of action whatever against said defendant.

“And the plaintiff by his said attorney says that the declaration is good in substance.”

In view of this we turn our attention to the section material for enquiry—sec. 136 of the Act of 1875.

The first consideration suggested is this, and it ranges itself under the second question above stated.—Suppose defendant's view of the intention of the Legislature correct, yet, nevertheless, there is not a word in the section which makes it necessary to *allege*, in order to establishing the fraud and consequent liability of a person doing any of the acts stated in the section, that that person was then an insolvent or contemplated insolvency, or had then done or afterwards proceeded to do anything that made or would make him an insolvent within the meaning of the act. No evidence can be gathered

from the section or from any other provisions in the act, that such an *allegation* was required. It is admitted in the case before us that the defendant was indebted, that the indebtedness was never discharged, that he was a trader within the meaning of the statute, that he did some of the acts stated in the section, with the intents, in the character, with the knowledge, and with the concealment and the unsolved indebtedness therein stated, so that, if he were an insolvent, he is brought by the admitted allegations within the provisions of the section;—how can we say, what the Legislature has not said, viz: that some further allegations were necessary.

But referring to the first question :—The word ‘person’ in section 136 is a word therein used without any qualification whatever. That qualification, if intended, we must presume would have been expressed. No absurdity or even unreasonableness in the legislation will arise from construing the language in its plain and literal meaning, nor will such construction involve a repugnancy with any legislative language used elsewhere in the statute. Therefore we must construe according to the plain surface meaning. In other sections the word ‘person’ occurs, but unlike its use here, the context clearly restricts and qualifies the meaning. That persons are described in the section, who are made liable to the penalty for acting, not necessarily for themselves, but in a purely representative or fiducial character for others, as ‘manager, agent, trustee or employe,’ shews that the operation was not designed to be confined to an *Insolvent*. A mere ‘employe’ of another person, especially employed for the single purpose, purchases goods, say ‘an ox,’ on credit for that person, having no personal interest whatever in the transaction—and not being a subject of the act, e. g. a ‘*workman for hire*’ who is specially exempted under the Statute (see section 1);—that person, so employed, does one of the acts stated in the section, with the intent, knowledge, &c., as stated in the section, and the debt contracted is not paid :—could it be contended that he was not guilty of a fraud, and not liable to the penalty within the meaning of the section? Assuredly not, and yet he couldn’t be declared an Insolvent, because not subject to the act.

I think therefore, the demurrer must be set aside with costs.

BURTON, ADM'R., v. BURNS.

The time within which an appeal must be taken from a decision of the Equity Court, under R. S., cap. 96, sec. 75, runs from the day on which the decision is pronounced, and where a decision was pronounced on July 5th, 1876, but the decree, bearing date March 27th, 1876, was enrolled April 3rd, 1876, an appeal taken out on the last mentioned date was held too late.

This was an appeal from a decree of the learned Judge in Equity. An oral judgment in the cause was pronounced by his Lordship on the 5th July, 1875, from which an appeal was taken by the plaintiff. On the appeal coming on for argument it was stayed by a preliminary objection; and the decree being enrolled on the 3rd April, 1876, bearing date the 27th March, a second appeal was taken out from the decree which came on for argument during the present term.

The cause having been called—

Ritchie, Q. C., moved to quash the appeal on the ground that it was too late. *R. S., Ch. 95, Sec. 75*. The plaintiffs appealed first from the decision of the Judge, but when the appeal came up for argument, the cause was passed, and plaintiffs, not relying upon the regularity of their appeal, directed the defendants to take out a decree, and appealed from that decree.

The COURT.—We have decided in cases of appeal to the Privy Council that the date of the pronouncing of decision is the date of the judgment of the Court. As no notice has been given of this objection we will give Mr. Thompson time to look into the question and answer it.

Thompson subsequently showed cause,—Citing *Cooper's Eq. Dig., Suppl.*; *R. S., Ch. 95, Sec. 75*. This statute gives an appeal from any decision, order, judgment or decree. It is intended, for instance, to allow an appeal from an interlocutory decree or order. Suppose the Judge in Equity delivers an oral decision, not reported, or suppose that, at the close of an argument, the Judge should express a strong opinion one way, but reserve judgment till a future day, and on that day say he saw no reason to change the opinion formerly expressed, from what would we appeal? At common law judgment is

to discharge or make absolute a rule ; in the Equity Court a decree is frequently a complicated matter, settling complex and diverse interests.

McDonald, Q. C., in reply.—The practice here is different from that in England. The framers of the Statute in question use the word "judgment," which is not used in regard to any determination in the Chancery Court in England. In *2 Dan. Ch. Pr.*, 1018, it is stated that a decree does not become a record until it is enrolled, though the judgment of the Court runs from the date of granting the decree. *L. R.*, 1 *Q. B.*, 533; In *2 Dan. Ch. Pr.*, 980, n. 6, it is stated that a decree is dated and is binding from the day it is pronounced, not the day it is enrolled. Our Statute evidently uses the word "decree" as a synonym with the word "judgment."

Weatherbe, Q. C.—We have no minute in our Equity Court of the judgment of the Court, and if the Judge went away from the country there would be no means of knowing what the Court had decreed. *Cooper's Eq. Dig.*, 143.

The COURT.—We will reserve decision on this preliminary objection two or three days and look into it carefully ; and if we think it cannot prevail, we will appoint a future day for argument on the merits, or if we consider it doubtful we will give permission for an appeal.

YOUNG, C. J., now (March 6th, 1877,) delivered the judgment of the Court :—

On the 5th of July, 1875, an oral judgment was pronounced in this case by the Equity Judge, from which an appeal was taken by the plaintiffs under the Revised Statutes, Ch. 95, Sec. 73 to 78. On the appeal coming on for argument at the last Term, it was stayed by a preliminary objection, and the judgment or decree having been enrolled on the 3rd of April last, bearing date the 27th March, a second appeal was taken by the plaintiffs on the 3rd of April, to which a preliminary objection has again been urged, that the ten days allowed by the Statute for presenting the petition of appeal must be reckoned from the date of the oral decision or judgment, and not from the date when the decree was enrolled or filed. If the former be

the true date, the appeal is not in time, and, there being no authority to extend that time, either in the Equity Judge or in the full bench, the appeal cannot be heard.

There is no rule, and no decision has been pronounced establishing a practice of this Court upon the point, and therefore, under the 7th Sec. of Ch. 95, we must inquire into the practice of the English Chancery. Even there the practice was unsettled until the case of *Re Risca Coal and Iron Company** was decided in 1862 by the Lord Chancellor, WESTBURY. By the 33rd Sec. of the Imp. Act, 12 & 13 Vic., Ch. 108, no motion for a re-hearing of any order under that act shall be received, when three weeks shall have expired after the order complained of shall have been made. In the above case the order of the Master of the Rolls was pronounced on the 21st of Dec., 1871, but was not drawn up till sometime afterwards and notice of appeal had been served within three weeks after the order was drawn up, but not within three weeks from the time it was pronounced, and the Lord Chancellor held it was too late. "An order of the Court of Chancery," he said, "however long a time may elapse in the ministerial duty of drawing up that order and committing it to paper, is made to bear date on the day when it is pronounced by the Court."

"The theory of judicial procedure is, undoubtedly, that the cogent and binding effect of the order begins immediately from the time the order is pronounced by the lips of the Judge, 'The order must be considered as made when it is delivered.' The Practice of the Court as laid down in *2 Daniel* (Lib. Edit.) 980, 1018, is founded on this decision and is recognized also in Ontario by V. C. MOWAT in Cooper's Equity Digest, 144.

The cases in the supplement thereto, fol. 30, 1, do not apply to our statute. We are forced therefore to the conclusion that the appeal must be dismissed, as not being in time.

So in *The Queen v. Barnet Sanitary authority*, L. R. 1 Q. B. D., 558, where an appeal by Statute was given within twenty-one days after the demand of a rule or the decision of the Court, it was held that the time ran from the day the decision was pronounced, and not when it is drawn up and served. The decision was given on the 6th Sept.; the order served on the 24th, and the appeal on the 2nd Oct., which was held to be too late.

* 2 Jur., N. S., 900.

2 *Daniel*, 980, note §. The decree should be dated of the day on which judgment is actually delivered. 7 *Jurist*, 359, L.C.

A decree is binding from the day it is pronounced, and not merely from the time when it is drawn up. 8 *Jur.*, N. S., 900.

The minutes of the decree when pronounced are taken down by the Registrar, 980. A decree does not strictly become a record of the Court till it is enrolled, and till then it is liable to be altered by the Court itself upon a rehearing, 1018. *Cooper's Eq. Dig.* 144, MOWAT, V. C., held that the time for the plaintiff proceeding against the carriage of a decree should be reckoned from the pronouncing of the decree, not the entering of it. Supplement, 30; Further time given to appeal under special circumstances; a party's poverty not of itself an excuse.

HAMILTON v. ANGLO-FRENCH S. S. COMPANY.

Plaintiff, a travelling agent for a mercantile firm, being about to sail from St. Pierre to Halifax in defendants' steamer, took two trunks and an ordinary packing box, with cover nailed on, all three containing samples of merchandize, to the wharf where defendants' vessel was lying, and gave his trunks and box in charge of two men belonging to the vessel, though in what capacity did not appear. He did not see the things taken on board. The two trunks were received at Halifax, but not the box.

Quære, whether there was a sufficient evidence of delivery of the articles to authorized agents of the defendants.

Held, that the evidence sustained the finding of the jury that the goods (being freight) were received by defendants not as freight, but as personal luggage, and that defendants were not liable.

This was an action brought to recover damages for the loss of certain goods of plaintiff's delivered on board defendants' vessel to be carried from St. Pierre to Halifax. Defendants' pleas traversed the several counts in which the delivery of the goods to defendants to be carried for hire was set out.

The cause was tried at Halifax, before WILKINS, J., during the November Sittings, 1876, and a verdict found for plaintiff for \$144. A rule *nisi* was granted by the learned Judge who tried the cause to set the verdict aside on the grounds taken at the

trial, for the improper reception of evidence, and on the ground that the verdict was against law and evidence. The rule was argued 15th December, 1876.

Shannon, Q. C., in support of rule.—All the counts in the declaration allege that the goods were to be carried for hire, except the last count, which is for trover. Trover will not lie in this case; *Bullen & Leake*, 292. There is no delivery of goods to defendants proved. There is no evidence of it except that the box, addressed to A. B. & Co., was put upon the wharf. The evidence plainly shews that the party who put the box there paid freight for it. The plaintiff pressed upon the attention of the Court at the trial Chapter 25 of the Dominion Acts of 1873, but that Act does not apply to this case, because the contract, if any, was made out of the Dominion of Canada, at St. Pierre. The jury found that the property lost was personal luggage. It consisted of thirty-four coats, &c., samples of merchandize. Cited *Story on Bailments*, 499; *Roscoe's N. P. Ev.*, 617; *9 H. of L. C.*, 939; *10 C. B., N. S.*, 154; *8 Exch.* 30. These samples belonged to A. B. & Co., and were not Hamilton's own property. In *L. R.*, 4 Q. B., 366, one of the latest cases defining luggage, a large rocking horse was held not to be such a toy as would be considered personal luggage. *Saunders on Negligence*, 197; *L. R.*, 6 Q. B., 612. In the last mentioned case the plaintiff took with him several pairs of sheets, which were lost by the Railway Company, and the Court held that they could not be considered personal luggage.

MacCoy, Q. C., (with whom was Thompson) contra.—In *Brown on Carriers*, 496, there is a count in tort for the recovery of damages for passengers' luggage, which is followed in the declaration here. It is a distributive count. The count may properly be for hire, because the ticket covers the passenger and his luggage.

YOUNG, C. J.—The question here is, was this luggage?

MacCoy, Q. C.—This is not an ordinary case. All the cases cited by the other side are cases where passengers' luggage is limited by statute. The question here is whether the goods were taken on board as luggage, being merchandize, without

the knowledge of defendants. Before setting up that this was merchandize, they should have pleaded to that effect. They simply deny taking plaintiff or his luggage. Defendants' agent knew, it is proved, that plaintiff was a travelling agent, travelling with samples, and took his samples to St. Pierre as luggage. Plaintiff delivered two large trunks also containing samples to defendants with the box. The trunks were brought safely to Halifax; why not the box? Defendants' agent, *Guilford*, proves that he knew the trunks contained samples yet no freight was charged for them. Even if the box is held to contain goods that should pay freight, it is not necessary in order to make defendants responsible that the freight should be paid when defendants take possession. There is no evidence that plaintiff was unwilling to pay freight on delivery of the box to him. The only reason freight has never been paid is that the goods have never turned up to be paid for. In the case cited from *8 Exch.*, 30, it is laid down that if the goods are packed openly, in such a way as to be obvious to the carrier as merchandize, and passed by the carrier as luggage, he is responsible for them. They took the goods as luggage or as freight, and in either case they are responsible. Cites *10 M. & W.*, 169; *13 C. B., N. S.*, 717; *Story on Bailments*, 441; *Brown on Carriers*, 69.

Thompson follows.—Two questions arise in this case, whether there was delivery to the company, and whether, if there was, the law implies responsibility. As to the first question, the evidence is that the goods were put by the passenger on the wharf, within a few feet of the vessel's side, shortly before the hour of sailing, and the purser proved that if goods were so placed, they would, according to the usual practice of defendants' servants, be put on board. An officer of the vessel stated after her arrival in Halifax, that he had seen such a box on board the vessel after her arrival, which he thought had been landed at Sydney. As to the second question, cases already referred to shew plainly that defendants were relieved of responsibility solely on the ground that the merchandize was packed as luggage. In the case reported in *8 Exch.*, 30, the defendants escaped solely because the merchandize, ivory handles, was packed in a carpet bag, though the plaintiff car-

ried them on board the train himself, and no porter or servant of the defendants took delivery of them. In this case there is some evidence, which the jury believed, that the goods were taken on board.

Rigby, Q. C., in reply.—It cannot be contended that defendants are responsible because they had a lien for freight. As soon as they discovered the box contained merchandize, they could recover freight after carrying it, but that does not prove a contract to carry it. The fact that the goods were in a packing case is no notice to the defendant that they were merchandize, if produced by plaintiff as baggage.

Cites *Saunders on negligence*, 195-6. In this case the jury found that the case was received as personal luggage. It might have contained jewellery or silks of the value of thousands of dollars; surely in that case the company should not be held responsible for the value of those goods, when they were taken as ordinary personal luggage. The evidence shews that there were two officers, one to take charge of luggage, the other of freight. The first, seeing the trunks and box on the wharf, would take charge of the trunks and leave the box. The second, seeing the box there, would look at his manifest, and finding no freight entered for plaintiff, would leave the box on the wharf. There is no evidence that the box was ever seen on the vessel. There is an essential difference between the contract to carry freight and the contract to carry luggage; the first makes the carriers insurers; the second obliges them merely to use ordinary diligence.

SMITH, J., now (March 6th, 1877,) delivered the judgment of the Court:—

This action was brought to recover the value of a quantity of samples of merchandise alleged to have been shipped on board the defendants' steamer, the "Shattuck," by the plaintiff, at St. Pierre, to be delivered at Halifax, N. S. The declaration contained several counts alleging a contract on the part of the defendants with the plaintiff to carry the said goods for hire, and there was one count in trover, which was not relied on at the argument, nor do I think it could have been successfully.

The defendants pleaded five pleas—four substantially denying the delivery of said goods, and the contract set out in plaintiff's writ, and the fifth denying the conversion.

The evidence as furnished by the plaintiff shews that he was a travelling agent for the firm of *Anderson, Billing & Co.*, of Halifax, and carried samples of goods from Halifax to St. Pierre for the purpose of getting orders in the interest of said firm. These samples were packed in two trunks, designated by the plaintiff as sample trunks, and in "an ordinary packing box with a cover nailed on with rough boards, addressed to him at Anderson, Billing & Co., Halifax." He took them down to head of wharf of the agent of the "Shattuck," where she was then lying. He states that he spoke to some of her people who were busy about the vessel, and that there were other trunks on the wharf at the time; that he gave his trunks and box in charge of two men belonging to the ship, on board thereof, and that he was aware that they belonged to the ship; in what capacity it does not appear. He also states that he did not see the things taken on board. He received the two trunks at Halifax, but not the box. He was a passenger on board the vessel on that voyage, and paid no freight, and admitted to Mr. Belcher, at Halifax, that he delivered the trunks and box "as baggage."

As was correctly stated by *Mr. Thompson* at the argument, two questions arise under the pleadings in this case. 1st, Was there a sufficient delivery of the box in question to the defendants to render them liable for its loss? 2nd, Having been put on board as personal *baggage*, can the defendants be held liable for *merchandise*? I think the first question under the evidence presents a grave difficulty in the way of plaintiff's case. In England Parliament has interposed, establishing by statute what would be a delivery to bind a carrier. We have no such legislation here, and therefore must be bound by common law principles. I should be unwilling, in view of the authorities, to hold that a mere placing of goods on a wharf where a vessel lies, and receiving simply the assurance of a hand or common sailor on board, who may not have been, and who in all reasonable probability was not, authorised to receive goods in that manner, that he would take

charge of them, a sufficient delivery to bind the owners of the vessel in case of loss, more especially in the absence of any admission of their having been received or seen on board.

It is unnecessary however, to dispose of the case on this point, and it will only be required to refer to it again as to some extent connected with the second point, upon which, I think, after a careful consideration of the determined cases, some of which are in the highest English tribunals, the verdict cannot be sustained.

The law is too clearly and well established to be now doubted, that if a passenger carries merchandise as personal luggage, the company will not be liable for its loss. The case of *Cahill v. The London & N. W. Railway Co.*, 10 C. B., N. S., 154, is a strong authority to this effect; also 8 *Exch.*, 30; *L. R.*, 4 Q. B., 539; *L. R.*, 6 Q. B., 612. It was also held, in the United States, in a case reported in 98 *Mass.*, 83, that a railroad company is not liable, either to owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose travelling agent he was, to sell such goods by samples, nor in tort, for its loss, without proving gross negligence. It appeared to be conceded, at the argument, that this was the general principle applicable to these cases, subject to the exception recognised by PARKE, B., in *Shepherd v. The Great N. Railway Co.*, the case before cited in 8 *Exch.*, and by ERLE, C. J., in *Cahill v. The London & N. W. R. Co.*, viz., that "if the plaintiff had carried these articles exposed, or "had packed them in the shape of merchandise, so that the "company might have known what they were, and they "had chosen to treat them as personal luggage, and carry "them without demanding any extra remuneration, they "would have been reponsible for the loss." But, after all, the question resolves itself into this, as remarked by ERLE, C. J., in the case last mentioned, "was there knowledge on the "part of the Company, that that which the passenger was taking with him, as luggage, was in fact merchandise." In that case the box was marked "glass," and yet that learned Judge

said, "The point is whether we can from the facts stated come to the conclusion that there was knowledge on the part of the company, that is, of the company's servant, that the box was merchandise. I do not see my way to that conclusion. It is true, it had a semblance of merchandise, and was marked 'glass.' Probably the porter never thought about it at all. It is not found by the jury that the company's servant knew it was merchandise: and I do not think that we ought to arrive at the inference that they knew it as a fair and legitimate conclusion from the evidence." I am equally at a loss to see in this case how the Court can infer from the facts before us, that the company's servant, authorised to receive freight and *bind the* company to special obligations, knew the box in question contained merchandise. Irrespective of the absence of any proved authority on the part of the sailors plaintiff saw on board the "Shattuck," when he deposited his box and trunks on the wharf, to take charge of freight thus disposed of, the admission of plaintiff, that he delivered them as luggage, and his statement to that effect to *Mr. Belcher*, precludes, I apprehend, such an inference from being drawn. And the jury have found in reply to the questions put to them by the learned Judge who tried the cause, that the goods were not received as freight, but as personal luggage.

The rule to set aside the verdict must be made absolute.

IN RE STEPHEN PIER'S WILL

Where testator devised certain real estate specifically, and also made specific pecuniary bequests to several persons.

Held, (affirming *in re Estate of McKay*, 1 Oldright, 131,) that the real estate so devised could not be sold to contribute towards the pecuniary bequests, and that each party should pay his own costs, as neither party appeared to have brought the case reported by *Oldright* to the notice of the Court below.

This was an appeal from a decision of the Judge of Probate for the County of Halifax. The deceased devised his real estate to one Patrick Howard, and made a number of bequests

of personal property to various persons. It turned out that the personal estate of testator was not sufficient to pay the debts and legacies, and application was made on behalf of legatees to have the real estate contribute to the payment of legacies. The Judge of Probate decreed that the real estate was liable to contribute to the payment of legacies. An appeal was taken out by the devisee, and the appeal was argued December 16, 1876.

Bullock, for Appellant.—A devise of real estate is not to be broken in upon to pay legacies, *1 Peere W.*, 678; *2 Jarman on Wills*, 523 and 526; *2 Vesey*, 550; *3 Redfield on Wills*, 207; *2 Vesey, J.*, 328. In the last case it was held that legacies were not to be paid out of real estate devised, though testator directed expressly that his debts, legacies and funeral expenses were to be paid out of his estate. The marshalling of assets, under which this question comes, is fully considered in *3 Redfield*, 605; *1 Roper on Legacies*, 681; *9 Pickering*, 561; *8 Pick.*, 478. Debts and legacies stand on an entirely different footing. The decision of the learned Judge of Probate is based upon sections 26 and 31 of Chap. 90 of the Revised Statutes; but these two sections were intended to give power to sell lands only where it is necessary to pay debts or to pay legacies charged upon real estate by a will giving the executors no power to sell. In vol. 1 of *Mass. Laws*, p. 300, will be found a section (1) giving fuller expression to the tenor of English decisions than our own, while identical in substance. This statute is followed by cases in the *Massachusetts Reports*, in harmony with the English cases. Cites *14 Mass. Rep.*, 84; *5 Metcalf*, 280; *3 Redfield*, 375; *6 Ad. & El.*, 180.

Thompson, contra.—The decisions cited in *Jarman* are no doubt perfectly clear as to the state of the law independently of our statute. The devise here, however, is to the executor, and one of the cases cited makes land so devised liable.

YOUNG, C. J.—But the devise is to a certain person, who is subsequently made executor.

Thompson.—This case is exceptional in another respect. The legatees are near relatives, while the devisee is merely a brother-in-law; *Jarman*, 566; *13 Allen*, 522. The question,

however, principally depends upon the two clauses already cited from our Probate Act, especially the 31st. In the case reported in *13 Allen*, 522, the devise of real estate was a residuary devise, but the only effect of that was that the Court ordered that the legacies should be paid in full out of it.

Bullock, in reply.

WILKINS, J., now, (March 6th, 1877,) delivered the judgment of the Court:—

This is an appeal from a decree of the learned Judge of the Court of Probate of Wills for the County of Halifax, deciding that certain real estate of the deceased, specifically devised by his last will and testament, should be sold and the proceeds appropriated to the payment of pecuniary specific legacies stated in his will, the personal estate being insufficient for that purpose.

I presume that at the argument before the learned Judge his attention was not called to the report in *1 Oldright*, 131, of the case of "*In re Estate of McKay*," decided by this Court in the year 1861. It is to be regretted if that case was not brought to his notice, for it was most carefully considered and elaborate written judgments delivered therein by the Chief Justice and the late Mr. Justice BLISS, the whole Court that heard the arguments being of one mind in the decision. It is only necessary to compare it with the present case to see that the two cases are absolutely on all-fours with each other. The decision in an exactly parallel case was exactly the opposite of that which we are called on to review, and the former must necessarily govern the latter. There, as here, there were specific personal bequests, and no personal assets to pay them. There was not as here a valid devise, on account of defective execution of the will, but there were the claims of heirs, favored as they are in the eye of the law, and there, as here, a manifested intention of the testator to make an effectual devise of his real estate. The point of the decision was that the real estate of a testator was not to be had recourse to for payment of legacies unless there existed a clear and unmistakable intention of the testator that it should be made available for that purpose. The effect of our Provincial legislation, identical

then with what it is now, was carefully considered then by our Court, and the Court reached and expressed a conclusion respecting it that does not consist with the view of it taken by the learned Judge in the Court below. The Court said (p. 144):—"With respect to the sale of real estate for the payment of legacies, the Statute was intended merely to provide "a more expeditious and less expensive way of making it applicable for that purpose, whenever it was then already liable "under the law for the payment of legacies. This is all that "the Statute now in force could have meant. It never could "have been the intention of the legislature in so indirect a "manner to make the real estate of a testator liable for the "payment of the legacies given by his will, when he has by "that will evinced no intention of making it so liable. That "liability," continued the learned Judge from whose opinion in that case I quote, "I consider to have been left by the Statute "just as it was. It only provided this more easy mode of enabling the executor to apply it to that purpose, where it was "already so applicable. This seems to me," he continued, "the whole object and effect of the two sections (13 and 18) "of this Statute, and we shall satisfy the whole language and "requirements of these by this construction, as was said by "JACKSON, J., *ex parte Winslow*, 14 Mass. Rep., 422, in reference to the Statute of Massachusetts, which was similar in "this respect to our own."

It will be perceived from the learned and elaborate judgment of his lordship the Chief Justice in the case referred to, that the contention of the legatees was based on the very grounds stated by the learned Judge below, as founded on the views he entertained of the meaning of our Provincial Legislation. But those were most carefully considered, and were judicially repudiated in the case reported by *Oldright*.

It follows that the judgment before us, that has been appealed, must be reversed.

WILKINS, J., subsequently (April 2nd, 1877,) delivered a further judgment of the Court, with regard to costs, as follows:—

Each party should pay his own costs. There is no pretence

for putting costs on the estate. Neither party is without blame for the expenses of the appeal being incurred, since the case in *Oldright*, decisive of the question, was not brought by either party to the notice of the learned Judge of Probate. The considerations which influence the Courts in England in deciding by whom costs in such cases shall be borne, will be found stated in *Davis v. Gregory & Francis et al.*, reported in L. J. Rep. for the year 1873, in "Probate and Matrimonial Cases," p. 33.

MCGREGOR v. McARCHER.

The words "every subsequent offence" in R. S., Ch. 75, Sec. 6, and "subsequent offence" in 39 Vic., c. 1, s. 7, mean offences committed subsequently to the last previous conviction. WILKINS, J., dissenting.

In this cause a rule nisi was granted by a Judge to set aside a conviction for the sale of intoxicating liquors, on the ground that the defendant had previously been convicted for a subsequent offence.

Rigby, Q. C., in support of rule.—Cites R. S., Ch. 75, Sec. 6; *Acts of 1876*, Ch. 1, Sec. 7.

Graham, contra.—

YOUNG, C. J., now (March 6th, 1877,) delivered the judgment of the Court:

Appeal from a fourth conviction of defendant under the License Acts, R. S., Ch. 75, and question thereon under Secs. 2, 6 and 39, and the 7th Sec. of the Acts of 1876, Ch. 1. Under Sec. 39, the first conviction for \$10 must have been for an offence committed within six months. So also the second offence, proved by a conviction for \$20, and the third offence, proved by a conviction for \$40. Now comes the fourth for \$80, also within the six months, and within the same period there may

be, under Sec. 6 of Ch. 75, any number of subsequent offences and convictions therefor, each for \$80. The fact of an offence is established and known to the law only by a conviction, and the first offence under Sec. 7 of the Act of 1876, means the first time that the accused is convicted. The same section provides that the second, third, fourth, and subsequent offences shall, in all cases, respectively rank after the next previous conviction of the accused party. The question is, in what sense are the words "subsequent offences" to be taken in these sections. Are they to be read as if the words were "subsequent convictions," or as offences subsequent to a previous conviction? The latter sense, I think, on the principle of construction applied to penal statutes, should prevail, and the conviction in this case, for an offence, in the words of the rule, "committed anterior to a subsequent existing conviction of the same defendant for a similar offence," cannot be upheld. The rule therefore is made absolute with costs.

WILKINS, J., read the following dissentient opinion :

The intention of the Legislature on the point of enquiry, appears to me clearly deducible from its successive legislation. By Sec. 6 of Ch. 75, R. S., it had declared penalties thus : "for the first offence \$10, for the second offence \$20, for the third offence \$40, and for every subsequent offence \$80." The word "conviction" had not been introduced into the section. It had become questionable whether the progressive increase in the *ratio premendi* had relation to offences that were, relatively to the first known and proved offence, successively, second, third and fourth in the order of *time* of actual commission, or in the order of convictions for offending, irrespective of the time of committing, provided the prescribed limit of the six months were observed as to the particular charge before the justices. To remove doubt on that point, the Legislature, in 1876, (Chap. 1, Sec. 7), enacted that these words should be super-added to the section we have been considering, viz. : "The first offence shall mean the first time that the accused party shall have been *convicted* of violating the law relating to the sale of intoxicating liquors, whether upon confession, or after trial, or by default; the second, third, fourth and subsequent of-

fences shall in all cases, respectively, (i. e., removing the element of time of commission altogether), rank after the next previous *conviction* of the accused party." Thenceforward, assuming a conviction of any given case, the question of amount of penalty to be imposed has respect, first, to whether the party convicted has been convicted before: and, if convicted before, then, secondly, how often he had been convicted before. Thenceforward, no question can arise, if the party convicted has been convicted before, at what time he had been so convicted. If he is proved to have been convicted, at any time before, he stands before the Justices who have convicted and are about to sentence him, as a party who has violated the law twice, and he is punished accordingly with a fine of twenty dollars, *et sic de ceteris*.

It appears to me that no other construction than that which I suppose can be put on the law, as it is now presented to us. In my opinion the rule should be discharged with costs.

DESBARRES, J., said he concurred in the view of the learned Chief Justice. If the law were not as the Chief Justice had put it, he thought great injustice would be done. There would be no limit to the prosecutions covering the same period of time.

MCDONALD, J., concurred.

LOWNDS v. ROBINSON.

Defendant's horses and carriage, driven by his servant westerly along Spring Garden Road met opposite the gate of defendant's stable yard, situate on the northern side of the road, a horse and truck coming in the opposite direction, and instead of passing on the south side, attempted to pass on the side nearest the stable yard (the intention of the driver being to proceed to a house a few yards west of the stables,) when the horses suddenly turned in towards the yard, knocking down and injuring plaintiff, who was coming along the side walk near the gate. A rule having been taken to set aside the verdict found in favor of the plaintiff for \$400,

Held, that the verdict must be sustained.

This was an action brought for injury to the plaintiff, resulting from alleged negligent driving of the defendant's horses

by his servant. It appeared that the plaintiff was returning to the city from the suburbs when the accident occurred, and that, when immediately opposite to and only a few feet distant from the open gate leading from the street to the stable yard occupied by the defendant, she was suddenly knocked down by defendant's horses and carriage, then being driven by his servant, which were passing along the street in an opposite direction and suddenly turned in towards the gate which they were accustomed to enter. At the point of the road opposite to the stables, the carriage was met by a horse and truck which kept near the centre of the road, and the defendant's servant, instead of passing the truck on the southern side of the road, turned to the northern side on which the stables were situated, intending to drive on a little beyond the stables to a house to which he was taking his passengers.

At the trial, which took place before WILKINS, J. in November, 1876, the jury found a general verdict for the plaintiff for \$400, and answered certain questions put to them by the Judge as follows:—

Q.—Were the defendant's horses, when his servant drove his carriage towards his stables across the side-walk, driven at a walk across the side-path?

A.—They were not.

Q.—If not, did the horses, driven with competent skill and due care, cross the side-path at a faster pace than a walk, because, excited by some cause, they became so far unmanageable that the driver, endeavoring to the utmost to reduce their pace to a walk, was unable to do so?

A.—We are of opinion that the horses crossed the side-walk at a pace greater than that of a walk, but were not driven across said side-walk with competent care and skill. We are also of opinion that the horses did not become excited from any cause, nor did they from any cause become unmanageable. And, further, it is our opinion that the driver did not use his best exertions to reduce the speed of the said horses to a walk.

A rule *nisi* to set the verdict aside was argued before the full Court during the present term.

J. W. Johnston, Q. C., in support of rule.—There is no affirmative proof of negligence on the part of the defendant. If there

is any at all, it is merely a scintilla or surmise which is not sufficient to go a jury. *Addison on Torts*, 17; 8 C. B., N. S., 568; 3 *Id.*, 146.

The questions submitted to the jury are aside from the facts proved. The driver was not going to the stables, but to the General's on the opposite side of the street. His intention was to go straight along till he got opposite the General's gate, and he was on the north side of the street to make an easy curve. The first question is therefore aside from the real issues, as the horses were not being driven to the stables at all, but glanced off against the will of the driver. The witnesses all say that they started suddenly, that they bolted. He would not, if he intended to turn in there, be driving at the rate alleged in evidence.

Gray (with whom was McDonald, Q. C.) contra.—The defendant was driving home in the night time and confessedly on the wrong side of the road. In such case he is bound to use extra precaution, especially in the night time. Here the negligence was centered upon the very spot where it was most likely that the horses would bolt if at all. He was going with a free hand. He could have had his horses under control as proved by the fact that when he wished to check them he did so.

McDonald, Q. C.—There is evidence here of negligence, that the driver was so carelessly driving that an accident passing his own stable door was almost inevitable. Cites opinion of ERLE, C. J. in *Cotton v. Wood*, 8 C. B., N. S., 568. If there is any evidence of negligence the verdict must be sustained.

Coombes, in reply.—The fact of being on the wrong side of the road only enters into the case if there is a question of contributory negligence raised, and was so decided in *Conlon v. Connolly*, 1 R. & C., 95.

There is no evidence of negligence in respect to the accident at all. *Hammock v. White*, 11 C. B., N. S., 588.

This is a case where it is sought to hold the master liable, and the evidence of negligence must be specially strong. The question should not be left to the jury if the evidence is equally consistent with the absence of negligence and with negligence; 8 C. B., N. S., 568. Here the evidence is not

equally balanced; for there is a preponderance against the negligence. *Saunders on Negligence*, 15.

The case must be as strong as would be necessary to convict of manslaughter.

The driver could not possibly have anticipated the sudden start of the horses to the stable.

The case was improperly put to the jury as if the horses had been driven over the side walk, whereas the evidence shows that the accident was due to the sudden impulse of the horses.

As to excess of damages. The injury was not a permanent one and results from no deliberate act. (JAMES J.—There is evidence of permanent injury that the jury may have believed.) They do not claim for permanent injury and therefore that is a ground for setting aside the verdict, if evidence of that character has been admitted to affect the jury. *13 C.B., N.S.*, 430; *Conlon v. Connolly*, 1 R. & C. 95; *Roscoe*, 667; *3 C. & P.*, 260; *3 H. & C.*, 596.

JAMES, J., now (March 6th, 1877,) delivered the judgment of the Court:—

This is an action brought against a livery stable keeper for damage to the person of the plaintiff, occasioned by her being driven against by the horses and carriage of the defendant, while in charge of and being driven by the servant of the defendant, the damage being charged as resulting from the negligent and unskilful driving of the servant. The case was tried at Halifax on the 14th day of November last before Mr. Justice WILKINS, and resulted in a verdict for the plaintiff in the sum of four hundred dollars, which the defendant now asks the Court to set aside on the grounds:—

1st.—That the said verdict is against law and evidence.

2nd.—For excessive damages.

3rd.—For misdirection of the learned Judge who tried the cause, in not properly submitting to the Jury the question of negligence, and for submitting improper and insufficient issues to them.

4th.—For the improper reception of evidence and for the improper rejection of evidence.

Several questions relating to the issue were put to the Jury by the learned Judge, all of which were answered in favor of the plaintiff.

It appears by the evidence that on the evening of 28th May, 1873, the plaintiff, who is a widow residing in the City of Halifax, was returning into the city from a visit to a friend in the suburbs, and that, as she was passing along Spring Garden Road, on the northern side walk, in an easterly direction, and when she was immediately opposite to and but a few feet from the open gate which led from the street into the stable yard occupied by the defendant, she was suddenly knocked down by the defendant's horses and carriage, then being driven by his servant, which was passing along the street in the opposite direction, and which suddenly turned towards the stable gate, which the horses were accustomed to enter, and before the plaintiff was aware that they had turned out of the street, crossed the side walk and collided with the plaintiff, doing her serious injury.

A weak attempt was made by the defendant at the trial to prove that the horses were seized by an uncontrollable impulse at the moment, occasioned by a passing truck. It appears that the driver was conveying two passengers to a residence a few yards further west than the stables and on the opposite or southern side of the street, and that at the point opposite the stables he was met by a horse and truck which kept near the centre of the street, and that instead of passing this truck on his left hand side, as he was bound to do by the law of the road, he chose to take the opposite side, which would carry his horses within ten or twelve feet of their open stable gate. What could be more natural than that the tired and hungry animals should suppose that they were being driven to their stable, and, moved by impulses not exclusively confined to the equine race, should have turned their steps thitherward without the slightest thought of impropriety?

The driver must have been aware of the disinclination of horses to be driven past their stables even in the day time, and he ought to have foreseen that it was too much to expect them, tired and hungry, to walk placidly past their stables at

short a distance as ten or twelve feet without attempting to turn in. If for no other reason than to anticipate and avoid this difficulty, he ought to have kept on his own side of the street, and, if he chose to do otherwise, he should at least have been on his guard to prevent their turning when opposite the gate. It does not appear that the horses were at all unmanageable or subject to start; even on this occasion he managed to stop them before their heads had passed inside of the gate, where they continued to stand for some fifteen minutes.

There is no evidence whatever to lead to the belief that the horses were under any influence more exciting than the natural desire for bed and supper, and this the driver ought to have foreseen and guarded against.

I am of opinion therefore that the accident resulted from the careless and negligent driving of the defendant's servant, and that the jury could have come to no other conclusion than to find a verdict for the plaintiff.

As for the damages, that was solely a question for the jury, and I do not think that under the evidence they can be called excessive.

I think the rule *nisi* should be discharged with costs.

GILLIS v. TRUSTEES OF SCHOOL SECTION 9½.

Plaintiff brought an action on the case, setting out that he had made a contract with defendants, and had been prevented by them from completing it.

Plea, that he had failed to carry out the contract, held bad on demurrer.

Plea, setting up a new agreement between the parties respecting the same subject matter before action, held good, though not averring that the new agreement was before breach of the first, and not alleging accord and satisfaction of the breach.

This was a demurrer to pleas.

The plaintiff's declaration set out "that by a certain agreement made between the plaintiff and the defendant

bearing date the — day of October, A. D., 1873, the plaintiff, in consideration of the sum of one hundred and fifty-nine dollars of lawful money of the Dominion of Canada, which the defendants thereby undertook to pay to him as the work progressed, agreed with the defendants to build a new school-house for said Section, No. 9½, within a certain time, and according to a certain specification delivered to him, the plaintiff furnishing the materials therefor, except the scantling for the frame, that the plaintiff expended large sums of money in the prosecution of the said work according to his contract, and provided a large amount of materials, and the plaintiff was always ready and willing to complete the said contract, but that the defendants, during the time limited for the performance of the said contract, wrongfully prevented his proceeding with the said contract, and refused him the completion thereof, whereby he lost the profits to which he was entitled, and was put to great expense in procuring material for the completion of the said contract."

The defendants by their third plea said, "that the plaintiff did not keep or perform the said covenant and agreement on the part of the plaintiff to be by him kept and performed as by said covenant and agreement specified, nor was the said work completed by him according to said covenant and agreement, nor were all conditions of the said agreement fulfilled, nor did all things happen necessary to entitle the plaintiff to payment as alleged, whereby the defendants suffered loss and damages." Their fourth plea set out "that before action it was agreed by and between the plaintiff and defendants, that the plaintiff should and would deliver up to the defendants for the purposes of the said School Section the said work being the said new school-house then in an unfinished condition, through the laches of the said plaintiff, on condition that the said defendants would purchase from the plaintiff certain material of the plaintiff, useful for the completion of the said unfinished new school-house, and in consideration of said laches of the plaintiff, and the said defendants say that they, the said defendants, in pursuance of said agreement before action as aforesaid, took delivery of said unfinished new school-house, delivered to them

by said plaintiff for the purpose aforesaid, and that they, the said defendants, purchased the said materials from the plaintiff and took delivery of the same, whereby the plaintiff's claim, if any, was fully satisfied and discharged."

To those two pleas the plaintiff demurred on several grounds, the principal grounds being, however, that the third plea neither denied nor confessed and avoided the ground of action set out in the declaration, and that the fourth plea did not allege that the new contract therein set out was in satisfaction and discharge of that set out in the declaration, and did not allege that the new contract was made before breach of the first.

The demurrer was argued during the December term, 1876-7.

Thompson, in support of demurrer.—This is an action for preventing plaintiff from proceeding with his contract. The third plea is that he did not complete his contract, which is no answer, and which further we admit in the declaration.

The conditions alleged to have been not complied with, are not specified. *R. S.*, Ch. 94, Sec. 151.

The fourth plea avers no accord and satisfaction of the first agreement to build the school-house.

Cites *B. & L.*, 478; *5 B. & Ad.*, 742. A substituted agreement is good plea of accord if made before breach of the first and on a new consideration.

A mere accord without satisfaction is not sufficient.

Saunders on Pl. & Ev., 24; *2 Story on Contracts*, (4 Ed.) 570; *14 Q. B.*, *N. S.*, 380; *16 Q. B.*, *N. S.*, 1039; *5 M. & W.*, 289; *1 C. M. & R.*, 741.

Graham, contra.—The fourth plea is nearly as good as one in *B. & L.*, 479. It does not stop at the statement of the substituted agreement, but avers the performance of the agreement, viz., that the defendants took possession of the goods useful for the completion of the building.

When there is a settlement after breach with consideration it is sufficient. There is consideration here; *B. & L.*, 673. Plaintiff was exonerated. The defendant's right of action against him was barred by the substituted agreement.

As to general denial of conditions being performed, they say, we prevented you because you did not do certain things in the specification mentioned.

MCDONALD, J.—Is not this one of the cases where application should have been made for amendment before demurring?

Thompson, in reply.—There is no such thing as substitution of one agreement for another, except as accord and satisfaction or rescission.

There is no accord here averred. They merely say they took the building off our hands, which is the grievance we complain of. (MCDONALD, J.—They say that was done by your consent.)

There may be laches without violation of the agreement.

The agreement set up might be proved in the terms in which it is set up, and yet be no answer to our cause of action. It may have been after breach. Their contention is perfectly consistent with our cause of action.

SMITH, J., now (March 6th, 1877,) delivered the judgment of the Court :

This is a demurrer to the third and fourth pleas of the defendants. The action was brought by one *Alex. Gillis* against the trustees of School district No. 9½, in the County of Inverness. The plaintiff's declaration alleges and sets out that he agreed with the defendants to build a new School house for said section, for which they were to pay him \$150, as the work progressed, the plaintiff furnishing material therefor, except the scantling for the frame, that he expended large sums of money in the said work, found materials according to his contract, was always ready and willing to perform his contract, but that the defendants wrongfully prevented his proceeding with the said contract and refused him the completion thereof. The gravamen of the plaintiff's alleged cause of action is *the defendants' refusing to permit him to complete his contract*. The contract as set out is not denied. The third plea demurred to is clearly bad. It affords no answer to this action, being consistent with the plaintiff's declaration. The

plaintiff admits he did not complete his contract, but charges the defendants with the injury of refusing to permit him to do so. This is the gist of his suit, and therefore the plea may be strictly true and yet afford no answer to it.

With reference to the fourth plea, I confess I had at first some doubts as to its sufficiency. I thought that, as it did not allege the agreement as being substituted for the first, and only stated that it was entered into *before action*, and not *before breach*, unaccompanied by the averment, held in England to be necessary, that it was accepted in satisfaction,—that it could not be sustained. On turning, however, to the 116th section of our practice act, I am led to the conclusion that this plea does *substantially* set out an agreement which, if made, would be an answer to the action. It is not an action to recover for compensation for work done, but for damages for the defendants preventing plaintiff from fulfilling his engagement. They virtually say, we did not prevent you from completing the School house—you failed to do so, and in consequence of your laches, and in consideration thereof, and of our purchasing the materials on your hands, you agreed to hand over to us, and we agreed to accept, the unfinished building, and abandon the contract on both sides; and they aver the complete execution and carrying out of such agreement. As a matter of technical and formal pleading, I am of opinion it would have been more prudent to have *ipsissimis verbis* alleged the *acceptance* and *satisfaction*, but in view of our system of pleading, striking down all mere formal and technical averments, I think this plea substantially a sufficient answer to the action.

We think the demurrer to the third plea good, but the fourth plea must be sustained.

O'CONNOR v. ROYAL CANADIAN INSURANCE CO.

Where no one appears in support of a rule *nisi* for a new trial, when the cause is called for argument, the rule *nisi* will be discharged after reasonable time for the party who took it out to make such application as the circumstances call for.

When this cause was called for argument, no one appeared

in support of the rule *nisi* to set aside the verdict and for a new trial, and the opposing party moved that it be discharged. The Court declined to discharge the rule at the time.

YOUNG, C. J., now (March 6th, 1877,) delivered the judgment of the Court :

We deferred signing a rule discharging the rule *nisi*, to give time to the party who took it out to make such application to the Court as the circumstances might call for. Sufficient time having elapsed, and no application having been made, we now give a rule discharging the rule *nisi*.

GISBORNE v. CAPE BRETON CO.

Where an injunction from the Equity Court was outstanding, restraining the plaintiff from proceeding in their common-law suit, the Court refused to extend a submission in the common-law suit, applied for to enable the parties to proceed with the reference when the injunction should be removed.

McDonald, Q. C., now (February 10th, 1877,) for plaintiff moves to make absolute a rule *nisi* to extend rule of reference so as to be able to proceed under the reference whenever the injunction, outstanding in the Equity Court, may be withdrawn.

Weatherbe, Q. C., contra.—I have no notice of this motion. The rule *nisi* expired some days ago.

McDonald, Q. C.—Then I move to extend the rule *nisi* until it expires. It expired while the Court was not sitting.

Weatherbe, Q. C.—You cannot extend without reviving the rule.

The COURT.—We will extend it till next Saturday.

YOUNG, C. J., now (March 6th 1877,) delivered the judgment of the Court :

As there is an order of the Equity Court outstanding restraining the plaintiff from proceeding in this suit, we will charge the rule *nisi*, but without costs.

ROBINSON v. CITY OF HALIFAX.

Where plaintiff, in an action against the city of Halifax for compensation for injuries received through negligence of the city's contractors, failed to give any proof of notice of action beyond a minute of the City Council, stating that a letter from plaintiff's solicitor, claiming damages, had been read before the Council, and a notice to defendants to produce the letter, not complied with,

Held, that the plaintiff could not succeed for want of sufficient notice of action under section 276 of the city charter.

This was an action against the city for damages on account of injury to plaintiff's horses through the alleged negligence of the city authorities in leaving a temporary excavation on Morris street uncovered. Plea—among others—that no notice of action had been given pursuant to statute. The cause was tried at Halifax, and a verdict found for plaintiff for \$50. A rule *nisi* to set the verdict aside was granted by the court, and argued early in December Term, 1876-7. The point upon which the argument turned was the want of notice of the action. The only direct evidence of a notice was a minute of the City Council stating that "His worship the Mayor submits a letter from John Ervin, Esq., solicitor of Mr. Robinson, claiming damages for injuries received by his horses falling into an excavation in Morris street;" and another,—“Read a letter from John Ervin, solicitor of Thomas Robinson relative to damages done his horses by an excavation on Morris street.”

Rigby, Q. C., in support of rule.—There has been no notice as required by statute, *City Charter*, 1864, sec. 276. The only evidence here of notice, is a notice to produce a letter of Oct. 1st, the action being brought on the 11th of November, and a minute of Council, October 8th, 1874, stating that a letter has been read. *1 Holt N. P.*, 27; *10 Ad. & E.*, 188. In the latter case the notice was held deficient because it did not state the time after which action would be brought or during which tender of amends might be made. The letter in the case here was merely a letter of courtesy. It was handed to the contractor who had also twenty days to make a tender of amends.

Ritchie, Q. C. (with whom was *Ervin*), contra.—The case in *Holt* does not apply. The letter there was addressed to the

Secretary and not to the company. The statute required all actions to be brought against the Treasurer. In the case in *Ad. & E.*, the paper in question was not a notice at all, but simply a request to give up the name. Here the city had the original letter, the notice, which they declined to produce. The city admit by their minute that they had a notice. (SMITH, J. In the case in *Ad. & E.*, stress was laid on the time not being mentioned in the notice, within which amends could be made.)

The presumption must be that the notice was sufficient, as the city, having received it, have declined to produce it.

Ervin.—The added pleas were not pleaded until more than six months after the accident. Had they been pleaded in the outset, I could have discontinued and brought another action, but the delay in pleading prevented that course. *Roscoe, N. P.*, 1155. The want of notice was put to the jury and they have found it affirmatively on evidence. (WILKINS, J.—The question is one for the Judge.) Here there is evidence to support the finding of the jury as to notice. Cites *1 Dowl., N. S.*, 555.

The only purpose that would be effected by a notice has been accomplished in this case, as the city actually had an opportunity to make an effort to indemnify themselves.

YOUNG, C. J., now (January 6th, 1877), delivered the judgment of the Court :

We have looked into the matter carefully, and all agree that the want of notice is fatal.

KINNEY (ASSIGNEE), v. DUDMAN.

Where judgment is for defendant, and plaintiff, appealing, wishes to stay execution for defendant's costs, he must give security for \$750, or \$250 in addition to the \$500 prescribed by "The Supreme and Exchequer Courts Act."

On Saturday, Dec. 23rd, 1877, *Graham* applied on behalf of plaintiff, who had given notice of appeal, for further time within which to file security for the appeal.

The Court having taken the application and the question of the amount of the security to be given into consideration, subsequently, (March 6th, 1877,) per SIR WILLIAM YOUNG, C. J., delivered judgment:

Where judgment is for defendant, and the plaintiff, appealing, desires to stay execution, he must give security for \$250, in addition to the \$500 required by the Dominion Act. That is the rule adopted by this Court. If the plaintiff therefore desires to stay execution, the bond must be for \$750.

WEEKS v. BONHAM.

Where a summons for selling liquor contrary to law was issued by two Justices of the Peace, and the cause tried before one of them and a Justice who had not signed the summons. *Held*, that the conviction must be set as.de.

This cause came before the full Court under the following circumstances, as reported by SMITH, J.

"This was an appeal cause tried before me at Shelburne, in September last. I confirmed the judgment below for the plaintiff, which was a conviction for selling intoxicating liquors contrary to law. *Mr. MacCoy*, on behalf of the defendant, made a preliminary objection before proceeding with the trial, which he afterwards renewed at the close of the plaintiff's case, that the summons was issued by two Magistrates, named Jacob Locke and Austin Locke, whereas, it is admitted, it was tried and conviction signed by Jacob Locke and John M. Dale, against the protest of the defendant's attorney. An application for a rule was strongly urged, which I at last assented to give on this ground alone."

Meagher, (with whom was *MacCoy*, Q. C.,) in support of rule—The summons commands the defendant to "appear before us," i. e., the magistrates signing the writ. Under Sec. 21 of *Chap. 91, R. S.*, the defendant is directed to file the particulars of his set-off, if any, before one of the magistrates issuing the writ; suppose the magistrate before whom the set-off is filed,

does not attend the trial, the defendant would find it difficult to get the benefit of his set-off. *3 T. R.*, 38; *Potter's Dwarri* 276. (YOUNG, C. J.—The statute under which the conviction was given provides that no conviction shall be set aside for any formal objection. This is an objection to a mere matter of form.) It is an objection to the jurisdiction. If the Court below had no jurisdiction, then the judgment of the Supreme Court falls with the conviction below.

MacCoy.—The point is important as affecting the right of magistrates to try causes generally on summonses not issued by them. *Broom's Legal Max.*, 841.

YOUNG, C. J., now (March 6th, 1877,) delivered the judgment of the Court :

This is a summons under the License Act, R. S., ch. 75, signed by two Justices, but tried and a conviction had before one only of those two, and another Justice sitting in room of the second Justice who had signed. Section 23 provides that penalties may be recovered "in the same manner and with the like costs as if they were private debts." Now the Justices Act, R. S., ch. 91, sec. 38 declares that "executions, when practicable, shall be signed by the two Justices who issued the mesne process and tried the cause," and we think that unless some special reason is shewn, the cause must be tried by the same two Justices who signed the writ. No reason for the change is shewn here, and the only question is, whether under sec. 31 of ch. 75, this is a substantial or only a formal objection. On the whole we think it better to extend the same rule to the License law as to other cases; but as the point was doubtful as well as new, we set aside the conviction without costs.

IN RE ESTATE OF MITCHELL, INSOLVENT.

Under sec. 67 of the Insolvent Act of 1869, and sec. 91 of the Insolvent Act of 1875.

Held, that a clerk and two employes who had left or been dismissed from the service of an Insolvent sixteen, twenty-one, and thirty-five months, respectively, before his assignment—could not be collocated on the dividend sheet by special privilege for arrears of salary and wages.

This was an appeal from a decision of the Judge of Probate and Insolvency for the County of Hants, giving a preferential claim to three claimants, Fitch, a book-keeper, and two others, laborers, in the employ of the Insolvent, Mitchell, but who had left the employ, or been dismissed, some time before the insolvency.

Ritchie, Q. C. in support of appeal.—The only case in point is *ex parte Saunders*, cited in Smith's Master and Servants, under the Act of 6 Geo. IV., p. 448.

Sedgewick, contra.—Our Act of 1869, sec. 67, is similar to the English Act of 6 Geo. IV. In England they have changed the statute since that time.

In *Montague & McArthur*, 100, *ex parte* Grellinger, the Vice Chancellor says the section relating to preference of employes must be construed liberally.

One of these men left actually because he could not get his pay. In *2 Montague & Ayrton*, 684, *ex parte* Saunders, a clerk left six months before the *fiat* because his employer had made an assignment of his estate in trust, and it was held that his leaving was involuntary, and his claim was allowed. *3 Deacon's Rep.*, 563.

Under the Act of 1875 the trader cannot make a voluntary assignment; under Mr. Ritchie's contention he will be obliged to keep on all his employes to the detriment of his estate, until a demand under the act is made by a creditor, in order to give them a preference.

Robeson on Bankruptcy and cases there cited.

Ritchie, Q. C., in reply.—There is a distinction between the English Act and ours. The claimants do not come within the terms of our Act, which speaks of the then current year

of service. There is no contention that Mitchell was insolvent when claimants left his employ.

SMITH, J., now (March 6th, 1877), delivered the judgment of the Court.

This was an appeal from the decision of the Judge of Probate for the County of Hants. It first came before me at Chambers, and, as I thought it involved a question of some nicety and importance, I preferred it to be settled by the full Court under sec. 28 of the Insolvent Act of 1875.

The claimants in this case contend that they ought to be collocated in the dividend sheet of the insolvent, *Mitchell's*, estate by special privilege, for arrears of salary and wages, under the 67 sec. of the Insolvent Act of 1869 and 91 sec. of the Act of 1875, and their claims were so allowed by the aforesaid Judge. *John C. Fitch* had been in the employ of the insolvent in the capacity of book-keeper, up to June, 1872, and was then dismissed, for the sole reason, as he alleges, to make room for his employer's son-in-law. He received, after having been so dismissed, on account of salary due him, in two payments, \$250, leaving \$266 due him at the date of the assignment in bankruptcy; and, for four months arrears, if his contention was correct, he would be entitled to \$200. *Mitchell* assigned on the 13th Nov., 1873. The claimant *Bell* was employed by *Mitchell* as a mill-wright, and left his position as an employe of said *Mitchell* in Feb'y or March, 1872, because, as he states, he was unable to get his wages. At the date of the assignment there was due him \$81.41. The claim of the other applicant, *John Bowers*, was agreed to be proved by the testimony of *Bell*. On examination by *Mr. Sedgewick* of this witness, it appears that *Bowers* left his employment as fireman with the insolvent in Dec., 1870, with \$15.67 due him. It is thus shewn that *Fitch* was dismissed from his employ some 16 months,—*Bell* left twenty-one months and *Bowers* nearly three years before the date of the bankrupt's assignment. It was contended on behalf of the claimants before the learned Judge of Probate that the statute did not confine these preferential claims for arrears of wages to "clerks and other persons in the employ of the In-

solvent" at the time of the assignment : and the judge so decided. I have looked carefully at such cases as I have had access to, and perused attentively the Imperial and Provincial statutes referred to at the argument, and I regret to be unable to coincide with this decision.

I do not understand it to be within either the letter or the spirit of our insolvent law to enable persons who were in the employ of the insolvent at an antecedent period to the assignment, to claim the special privilege of being treated as preferential creditors for arrears of wages, over the heads of persons whose debts, perhaps, had but a recent creation, and whose goods might be taken to satisfy this preference. Both sec. 67 of the Act of 1869, and sec. 91 of the Act of 1875 refer to " clerks and other persons in the employ of the insolvent, and about his business and trade," and surely we cannot read this as meaning persons who have ceased to be in his employ months and years before. To hold this would be open to grave objection as repugnant to the object of our legislation on the subject and inconsistent with the plain meaning of the law. The clause in the Act of 1875 not only limits the arrears for which employes can claim, but adds,—"*also for such salary or wages for a period not exceeding two months of the unexpired portion of the then current year of service, during which period they shall be bound to perform, under the direction of the assignee, any work or duty connected with the affairs of the insolvent, and which the insolvent himself might have directed them to perform under their respective engagements; and for any other claim they shall rank as ordinary creditors.*"

I am not aware that this portion of the clause in the Act of 1875 was brought to our notice on the argument, but it is clear that, if the decision of the Judge of Probate is upheld, this condition or duty imposed on the preferred parties would in such cases be rendered entirely inoperative and useless. I think the decision of the learned Judge below must be reversed.

COOPER v. MYLNE.

The County Court has power to grant relief under the sections of the Practice Act "of interpleader."

Meagher, now (February 27th, 1877), moved under sections 360, 361 and 368 of chap. 94, R. S., for the protection of the Sheriff of Colchester, in two causes brought against him by writ issued out of the County Court for the alleged conversion of certain goods seized under writ of replevin.

YOUNG, C. J.—The question is whether the County Court has not jurisdiction in the cause.

Meagher.—It is doubtful whether the County Court has jurisdiction.

YOUNG, C. J., now (March 6th, 1877), delivered the judgment of the Court :

Execution out of this Court—seizure of goods in defendant's premises thereunder, and sale thereof—proceeds in the hands of Sheriff of Colchester—Trover by Dan. Miller v. Sheriff in County Court—Damages \$150—affidavits by Sheriff and under Sheriff, under Interpleader Act, *Ch. 94, R. S., Sec. 360, &c.* These sections are founded on 1 & 2 Wm. IV., *ch. 58*, and *C. L. P. Act, 1860*, and were first introduced here by R. S., 1851, *ch. 149*, and Act of 1872, *ch. 20*.

The words "any court" in sec. 360 and 368 refer in the Act 1 & 2, Wm. IV., to the courts at Westminster, and in the Act of 1860, to the superior courts and the Courts of Common Pleas at Lancaster and Durham. In England the application should be made to the Court in which the action against the applicant is pending—*Arch.*, 1396, and where there are actions in two courts, the defendant must apply to each separately. 1 *Dowl. P. C.*, 152, 3 *Dowl.* 143.—Under the 13 sec. of the County Court Act, 1874, the practice, forms, and modes of procedure in the Supreme Court, when not otherwise provided for, shall be observed in the County Court.

The County Court, therefore, has jurisdiction in cases of interpleader, and must be applied to in this case. It alone has the power to regulate the proceedings in a cause regularly before it.

IN RE APPLICATION OF WEEKS.

The Court refused to allow a law student's articles of apprenticeship to be filed, *nunc pro tunc*, where they had not been filed at the time of their execution.

Weeks passed his examination, preliminary to being articulated as a law student, in December, 1875, and articulated himself to an attorney practising at Windsor. The usual indenture of apprenticeship was executed, but, through inadvertence, was not filed according to law. It had been handed to an attorney to be taken to Halifax and filed, and mislaid by him. The facts of its not being duly filed was not known to *Weeks*, who served under the articles from the time of their execution until a year later he came to Halifax and wished to have his articles transferred to another attorney.

W. R. Foster, during the December Term, 1876-7, made an application on behalf of *Weeks*, to have a fresh indenture made and filed as of the previous year, so that he should not lose the benefit of the year's service as an articulated clerk.

YOUNG, C. J., now (March 6th, 1877,) delivered the judgment of the Court :

We regret that we have no authority to grant this application. We have no doubt of the integrity of the statements upon which it is based ; but it would be too dangerous a precedent to allow documents of this description to be filed as of the time when they should have been filed.

CHURCH-WARDENS OF PARRSBORO' v. KING.

Rule of Court for reference, ordering *inter alia*—

1a. " That the arbitrators shall have power, &c., to examine, &c., and make an award, either separately or in one, of and concerning all accounts respecting the receipts and disbursements of moneys received from the interest, renting and sale of the glebe and church lands and the buildings thereon at Parrsboro', by the late Rev. W. B. K. or his agents, or by the defendant as his executrix, and all and every matter connected therewith or pending of and

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between the said parish of St. G. and the said W. B. K., or the defendant as executrix or otherwise." Award, "that the defendant do pay to the plaintiffs the sum of one dollar in full of the same."

1b. "That the said arbitrators, &c., shall have power to order judgment to be entered in this cause either for the plaintiff or the defendant, with or without costs, or to order judgment to be entered both for plaintiff and defendant, with or without costs, as they shall find the several issues either for or against either party." Award, "that judgment be entered for the plaintiff for the sum of one dollar," and that the defendant pay all the costs of the reference and award.

2. "That the said arbitrators shall have like power, &c., to hear, &c., and make an award of and concerning the receipt and disbursement of moneys received for the sale of the school lands at Parrsboro', and rents, issues and profits of the same and every matter connected therewith, adjusting the accounts and settling the balance due thereon." Award, "that the defendant is indebted to the plaintiff as such executrix on the said school moneys, in the sum of \$1400, and that the said defendant do pay to the plaintiffs the said sum of \$1400, and, that judgment be entered for the plaintiff for that amount."

Held, that the award was bad as to submission 1, *a.*, in that it did not exhibit on its face or by necessary implication from what appeared in it, that the several matters referred to in such submission were finally adjusted and settled.

That the award was bad as to submission 1, *b.*, inasmuch as the arbitrators had exceeded their powers in giving costs of the reference and award.

That the award was bad as to submission 2, on the same ground as applied to the award under 1, *a.*, and because, while it found against defendant as executrix, it directed judgment against her absolutely.

An action of ejectment was brought by the Churchwardens of St. George's Parish, Parrsboro', against Alida King, executrix of the late Rector of the Parish, Rev. W. B. King, deceased. There being several matters in difference between the plaintiffs and the defendant, respecting church and school lands, and the proceeds and issues thereof, they agreed to submit them to arbitration, and the submission was made a rule of Court, under Ch. 109, R. S. The arbitrators made an award, which the defendant moved to have set aside. The points of the submission and award in controversy at the argument, are given in the head note above.

McDonald, Q. C., on Saturday, February 17th, 1877, moved to make absolute rule *nisi* to set aside the award.

By award 1, I mean in ejectment and for the glebe lands ; Award 2, school lands, \$1400. One clause of the reference, applying to both, is that the arbitrators can enter judgment with or without costs, or for both, or as they find issues. *In award 2, they find no award with reference to the costs (Meagher.—That point is not taken in the rule). It is. That is inconclusive, and a want of finality. I ask for the benefit of the strictest principles, if necessary, in behalf of the defendant. The objection pointed out would be fatal. It may be argued that the clause as to costs in No. 1, may supply the*

want in number 2. I admit that there may be cases tending to show that, if one award is good and the other bad, the awards will be separated.

Award 1, as to ejectment, is conclusive enough, but it stands tacked on what is the most important thing in the suit. Defendant's account against the Church-wardens was \$10,000. They were bound to state in the award all the particulars as to the accounts between the parties, distinguishing the liabilities in the manner directed by the submission, whether as executor, individually, or otherwise. *Russell*, 251; 1 *Nev. & P.* 288; 6 *Ad. & E.*, 119; 7 *Exch.*, 80; 3 *Bing., N. C.*, 874; 4 *Bing., N. C.*, 37; 6 *Dowl., P. C.*, 247; *James, N. S. R.*, 456; *Fisher*, 262; 3 *Ad. & El.*, 295; 9 *M. & W.*, 161; 3 *M. & W.*, 199.

Meagher, contra.—The point as to costs is not taken in the rule. There is nothing as to costs in the rule. The objections must be taken specifically. In this reference there was one suit which was decided, then an enlargement of the rule and reference of a number of matters. In one award they awarded \$1400 to plaintiff; in the other, costs of the suit and of the award. There is not a tittle of evidence to show injustice in the award. Had there been any, it would have been shown by a host of affidavits. It is a unanimous award, concurred in by the party nominated by the defendant herself as her judge.

If the accounts were not settled for thirty-five years, it was the fault of the testator.

The arbitrators are allowed to make two awards or one.

The rule does not take the grounds specifically enough, but states them in the most general manner possible. It is ordered that the "award or awards" be set aside. Both or one? They are two separate papers. How can I meet that? The rest of the rule is of that same character. That is not sufficient. *Russell*, 666.

The Court will *construe the award liberally*, and presume that it is good,—that is, liberally with a view to upholding it and making it final. *Russell*, 671, 672; *Id.*, 255, 256.

Those matters as to which it is claimed that no award was made were considered by the Arbitrators, and the Court must presume that. *Russell*, 255, 256.

(*Meagher* proposes to read affidavit to show that it makes no difference whether the award distinguishes between the liabilities, individually and as executrix. *McDonald, Q. C.*, objects. Cites *Russell*, 252. McDONALD, J.—To justify the Arbitrators, that fact should be shown to have been before them. It is not sufficient to show that it is the fact.)

The reference provides that all matters, individual and as executrix, be referred.

The suit is against her as an individual, and the award is against her as an individual, and the Court must presume that the liability is the same, or else that there is no liability as executrix.

Her liability is the same in either capacity.

(YOUNG, C. J.—Then why do they distinguish in the submission?)

The arbitrators do distinguish in one award, and in the other they do not mention any distinction. Therefore the Court must presume that in the latter case the liability found is individual. It must be presumed that the one award covers everything against her as an executrix, and the other, everything against her as individual. The suit against her was as an individual. *Russell*, 247; *Id.*, 258, 259.

The submission leaves it optional to find against her as individual or as executrix.

In a number of the cases referred to the terms of submission were altogether different from those here.

McDonald, Q. C., in reply.—The arbitrators were bound to determine the question of costs on each several issue. The only citation as to this, by Mr. Meagher, was *Russell*, 666, as to the want of specific character of the objection. The grounds stated there as insufficient, are not as specific as those here. *Russell*, 380, 381.

As to the defendant's characters,—as executrix and individually,—supposing her to have a private fortune, she would be liable, under that award, for the whole amount, whereas the estate might not be worth anything like the amount found to be due by the arbitrators.

The ground taken might apply to the costs of the action,

which was against her personally, but it could not apply to the costs of reference, which were another matter altogether.

(YOUNG, C. J.—Do you, Mr. Meagher, say that the \$1400 is to be entered against her as executrix, with costs *de bonis propriis*; should not the award declare? *Meagher*.—*Ferguson v. Butler* is authority for the payment *de bonis propriis*.)

There are several different subjects in the submission, rent, purchase money, interest, &c., and yet there is no distinction drawn in the award at all.

WILKINS, J., now (March 6th, 1877), delivered the judgment of the Court :

An action of ejectment to recover from defendant possession of certain land at Parrsboro' had been brought by these plaintiffs, and had resulted in the rule of reference afterwards entered into, respecting the ejectment and all matters in difference between the parties.

The following are the terms of the rule so far as the same do not respect the matter submitted touching the *school lands* referred to therein, which will be considered presently : " It is further ordered and agreed that the said arbitrators shall have full power and authority to examine, investigate, and take evidence upon and make an award, either separately or in one, of and concerning all accounts respecting the receipts and disbursements of moneys received from the interest, renting and sale of the *Glebe and church lands and the buildings thereon* at Parrsboro', by the late *Revd. W. B. King* or his agents, or by the defendant as his executrix, and all and every matter connected therewith or pending of and between the said Parish of St. George and the said *Rev. W. B. King*, or the defendant, as executrix or otherwise." The matters under review have been brought before us by a rule *nisi* to set aside the award, founded on an affidavit of *Mr. McDonald*. It states that the defendant is the widow of the late Rector of the Parish of Parrsboro', and also executrix of his last will and testament; that she claimed that large amounts were due her late husband in his life-time by the plaintiff corporation, and to her as his executrix, and also in her individual capacity; that the accounts between the said plaintiff cor-

poration and the late *Mr. King* in his life-time and the said plaintiff and the defendant as such executrix since the death of her husband were fully investigated, and that the arbitrators made their award in writing. These allegations of *Mr. McDonald* are not denied. The sufficiency and legality of the award are questioned. Looking at the terms of the reference above noticed, and having respect to this one branch of the submission, the primary question suggested is, what the arbitrators were required to shew in their award to satisfy the intent and meaning of the parties when they adopted those terms. Obviously it was required that the award should shew how questions of account and indebtedness stood ; first, between the plaintiff corporation and the late *Mr. King* or his agents at the time of his death, as respects his or their receipts and disbursements as regards interest, renting and sale of the Glebe and Church lands and buildings thereon at Parrsboro' ; second, how questions of account and indebtedness stood, at the time of the submission, between the plaintiff corporation and this defendant in *her character of executrix* as respects her receipts and disbursements as regards interest, renting and sale of the Glebe and Church Lands and buildings thereon ; third, how accounts stood and what the indebtedness, if any, was at the time of the submission between the Parish of St. George and the deceased, or between the Parish and the defendant as executrix, or between the Parish and defendant *otherwise* than in her representative character, so that the award should exhibit on its face or by necessary implication from what appears in it, that those several matters in difference were severally by the arbitrament finally adjusted and settled. Such, however, as I think, is not the result of the award, which is in terms as follows :—" And whereas under and by virtue of the said rule of court all accounts respecting the receipt and disbursements of all moneys received from the interest rent and sale of the Glebe and church lands at Parrsboro' by the late *Rev. W. B. King*, or his agents, or by the defendant as *his executrix*, were also referred to us, as well as all accounts and differences between the said Parish of St. George and the said defendant individually, and whereas we have heard the said parties, their witnesses, evidence, counsel and attorneys, of

and respecting the same, and have duly weighed and considered the same; now, therefore, we do award as follows, that is to say: that the defendant do pay to the plaintiff the sum of one dollar in full of the same, and that judgment be entered for the plaintiff, for the said sum of one dollar."

If this is to be viewed according to the plain meaning of the words used, the award says in effect, as respects one portion of the subject of our inquiry, viz: that which refers to the defendant's individual (not representative) indebtedness,—which was a distinct subject of submission—we find that she owes the plaintiff corporation one dollar. It says nothing more. Suppose hereafter she were sued in her representative character by this plaintiff for any other subject of their present claim than this last, could she avail herself of this award as an effectual legal defence to the action?—It appears to me a palpable purpose of the submission that the award should shew that which it does not shew. This is, moreover, a very different case from a class of cases in which an award has been upheld because it disposed of one of many matters submitted where other matters were not brought before the arbitrators. Here matters were brought before them and considered, *respecting which the award is silent*. It may be the arbitrators were unable to arrive at a conclusion respecting the other matters brought before them, and considered:—If so, the award would be on that account clearly bad *in toto*.—Before passing away from this first branch of the submission, I must not omit to notice, that the arbitrators, after awarding as above, proceed to award and adjudge in terms that the defendant, whom they had required to pay one dollar, *do pay all the costs of reference and award*. Observe, in connection with this, the power of the arbitrators respecting an award of costs is thus expressed: "The said arbitrators or any two of them, shall have power to order judgment to be entered in this cause either for the plaintiff or the defendant with or without costs, or to order judgments to be entered both for plaintiff and defendant, with or without costs, as *they shall find the several issues either for or against either party*." It must be taken that the judgment for the dollar is to be entered up without costs:—But the defendant, as we have seen, is required out of her own pocket to pay all

the costs of the reference and award. Control over the question of costs was given to the arbitrators only as they should find the several issues either for or against either party. It does not appear on what issue they have found that the defendant should pay the one dollar, awarded to be paid by her, and yet without such finding by the award which we have been considering, she is required to pay all the costs of the reference and award. *Russell* says (p. 354): "When a cause alone or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate respecting the costs of the cause," (here we have seen there can be no implication, as a limited authority is expressed) "but not of the reference or award," and each party must bear his own expenses of the reference, and is liable to half the costs of the award. The award among other matters, not before noticed, awarded that the plaintiffs are entitled to recover the lands claimed in the writ of ejectment in this cause and ordered that judgment in ejectment should be entered for the plaintiff with costs of suit. The rule of submission contained this further clause: "It is further ordered and agreed that the said arbitrators shall have *like* power and authority to hear, examine, investigate and take evidence upon and make an award of and concerning the receipt and disbursement of moneys received for the sale of the school lands at Parrsboro'. and rents, issues and profits of the same, and every matter connected therewith, adjusting the accounts and settling the balance due thereon—provided that in such last mentioned case their award or that of any two of them, shall be separate and apart from any other award or awards in this suit." Under this provision they made a separate award as follows:—"We do award that the defendant is indebted to the plaintiff as such executrix on the said school moneys in the sum of one thousand four hundred dollars, and we do award that the said defendant do pay to the plaintiff the said sum of fourteen hundred dollars, and that judgment be entered for the plaintiff for that amount."—Of course, the subject of submission to which this award refers is a part of the one general submission; and the words "*like* power and authority," occurring in the fourth section of the rule, shew that

all the other provisions which I have noticed must be considered as imported into that section and read as a part of it. All my observations, therefore, previously made with reference to the first award, apply equally to this ; except that the second award is made against the defendant *as executrix*. This last award directs a judgment to be entered against *the defendant*—not against her *de bonis testatoris, si non, etc.*—Yet the whole awarded indebtedness may have been incurred in her husband's life time, and may have existed at his death, and there may be no assets of the estate sufficient to discharge the amount awarded.—From the very nature of the submission it involves no admission of assets.—Even if such were involved, and even if there were sufficient assets, how could the defendant justify under this finding of the arbitrators appropriating them to the payment of this awarded judgment, which must be entered up against herself personally.

Some passages in *Russell*, (4 edition) p. 251, and following, will be found, having an important bearing on the subjects of our investigation. Among these there is a significant one in these terms :—"An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the *intention of the parties, as expressed by the submission, be that he is to award separately on some one or more of them, or there is some legal necessity for his awarding separately,—as for instance to determine the right to costs.*" (*Rule v. Bryde*, L. R. 1 Exch. 251.)

We are of opinion that the rule to set aside the award must be made absolute with costs.

IN RE REFERENCE BETWEEN EATON AND STEWART.

Submission, "that judgment should be entered thereon with costs for the party in whose favor the award should be made."

Award (made a rule of Court under R. S., Ch. 110) containing the following findings:—

"1. That it was not justifiable for Watson Eaton to advertise doing business in the Colonial Market.

"2. That Stewart's rent should be increased one hundred dollars per annum.

"3. That Stewart should deliver up to Eaton any of Eaton's guarantees then held by Stewart.

"4. That the debts due and owing the late firm of Stewart and Eaton, amounting to \$89.94, be collected by Eaton and retained by him for his own use.

"5. That the balance due and owing by Stewart to Eaton amounts to \$16.76, which Stewart is to pay Eaton at once.

"6. That the expenses in connection with the arbitration and law expenses should be borne equally by Stewart and Eaton."

Held, that the Court could not enter judgment, as the only amount directly awarded is money to be recovered by Eaton from Stewart was \$16.76, which, being under \$20.00, was below the jurisdiction of the Court.

The parties had been in partnership and had many unsettled matters between them relating to their partnership and to other transactions, including a dispute as to the continuance of Stewart's tenancy of a portion of the Colonial market, which he held under Eaton, and as to the rental to be paid. To settle all disputes they joined in articles of submission to three arbitrators, which provided among other things that the submission with the award might at the instance of either party be made a rule of Court, and that "judgment should be entered thereon with costs for the party in whose favor the award should be made, in the same manner as if the verdict of a jury had passed therein."

The arbitrators found as follows :—

"1. That it was not justifiable for Watson Eaton to advertise doing business in the Colonial market."

"2. That Stewart's rent should be increased one hundred dollars per annum.

"3. That Stewart should deliver up to Eaton any of Eaton's guarantees then held by Stewart.

"4. That the debts due and owing the late firm of Stewart and Eaton, amounting to \$89.94, be collected by Eaton and retained by him for his own use.

"5. That the balance due and owing by Stewart to Eaton amounts to \$16.76, which Stewart is to pay Eaton at once.

"6. That the expenses in connection with the arbitration and law expenses should borne equally by Stewart and Eaton."

B. H. Eaton (for *W. Eaton*) having obtained an order under chap. 110, sec. 21, Rev'd Statutes, making the submission and award a rule of court, took a rule *nisi* from the court in April, 1877, returnable at chambers, to set aside the sixth clause of the award, and to enter judgment for the amount awarded to *Eaton*. This rule was argued before *WILKINS, J.*, at chambers, and made absolute with costs.

The matter now, December Term, 1877, came again before the Court on an appeal from the chambers decision.

Eaton, in support of the rule, contended that under sec. 22, chap. 110 Revised Statutes, the Court had jurisdiction to deal with and enforce or set aside in whole or in part the award, the same having already been made a rule of Court, and that having jurisdiction the Court should strike out that clause of the award having reference to costs, the matter of costs not having been submitted to the arbitrators, but expressly provided by the submission to abide the award as in case of a verdict, and that judgment ought to be entered for *Eaton*, because the award was clearly in his favor, giving him as it did a balance of \$16.76, also one-half of \$89.94, also giving him \$100 additional rent.

Cited *Tidd*, 830, note A ; *Russell on Arbitration*, 308.

Sedgewick, contra, contended that the arbitrators had authority to deal with the question of costs, notwithstanding the provision in the submission making them to abide the award.

Cited 1 *H. & C.*, 567 ; *Ch. Arch. Pr.*, 1873, note E. ; *Kelsie v. Stopplea*.

YOUNG, C. J., now (March 6th, 1877), delivered the judgment of the Court :—

We had no hesitation in making this submission and award a rule of Court, as it settles matters of great consequence.—*Mr. Eaton* contended that *W. Eaton* had a right to costs, as the award was on file and made a rule of Court. It is a subsisting obligation. The sole thing we have to deal with however is the award for \$16.76, and we cannot give costs upon that—we have no jurisdiction, the cause of action, as ascer-

tained by this award, being under \$20. That is the single point before us. Therefore we think the party must bring his action upon the award for his costs ; we can find no remedy.

The appeal was sustained, without costs.

TREMAINE v. HALIFAX GAS LIGHT COMPANY.

Plaintiff's wife was injured by an explosion of gas, caused by some defect in the gas pipe, in the room of a house rented and recently occupied by plaintiff. The room had previously been used as an office for a factory adjoining, and received its supply of gas from the factory. The factory had for some time been unoccupied, and the gas turned off by the Gas Company. Subsequently and shortly prior to the accident, gas was turned on again at the factory.

Held, that the Gas Company was not liable for the injury, not being liable for the condition of the gas pipes inside of any private building.

This was an action to recover damages for injuries to plaintiff's wife by an explosion of gas in plaintiff's house, occasioned by a defect in the gas pipes. The facts of the case were as follows :—Plaintiff went into occupation of a house adjoining a factory then unoccupied and having no gas meter, near Freshwater, in the city of Halifax, in the summer or autumn of 1871, and had a gas meter put into the house and certain repairs made to the pipes, calling the attention, at the time, of the Gas Company's servants who put in the meter, to the open ends of certain gas pipes in a room which had formerly been used as an office for the factory, and which had been supplied with gas from a pipe leading from the street or lane into the factory. Nothing was done to these pipes, the workmen saying that they supposed the pipes were secured elsewhere. Some time after plaintiff went into occupation of the premises, gas was turned on at the factory, and plaintiff's wife and servant going into the room in question with the occupant of the factory, leaving a light burning in the hall, an explosion took place, which caused severe injuries to plaintiff's wife and to the building and furniture. The defence relied on was that the company were not responsible for the pipes and fittings in the house, and that the plaintiff and his wife had been guilty of contributory negligence.

The cause was tried before Mr. Justice McCULLY, at Halifax, in November, 1872, and a verdict found for plaintiff for \$3000.

This verdict was set aside by the Court, on the ground that the Company was not liable, and the cause was tried a second time before Mr. Justice DESBARRES at Halifax, in April, 1876. A verdict was again found for plaintiff, for \$3000, and a rule nisi to set it aside on the ground that it was against law and evidence was granted and argued February 7th, 1877, before DESBARRES, WILKINS, McDONALD and JAMES, JJ.

Ritchie, Q. C., in support of rule.—There is no evidence of notice to defendants of any defect in the pipes; 6 *Beav.*, 552; 2 *New Rep.*, 500; 1 *K.*, 159; 13 *Ves.*, 120; 3 *Maddon*, 34. The defendant's servants, when their attention was called to the defects in the pipes in question, were attending to a meter not connected with these. Notice to defendant's servants is not necessarily notice to defendants. *Angell & Ames on Corporations*, 300; *Story on Corp.*, sec. 140; *Story's Eq. Jurisp* sec. 108; *Byles on Bills*, 120.

There is no proof of negligence on the part of the Company; *Holden v. Liverpool Gas Company*, 3 C. B., 1; *L. R.*, 7 *Exch.*, 96. The plaintiffs had a stop-cock inside the house which would have shut off the gas.

There is evidence of contributory negligence. Plaintiff's wife was aware of the escape of gas several hours before the accident, but did not notify the company, and then went into the room leaving a light burning in the Hall. 8 C. B., 116; *L. R.*, 6 Q. B., 515; 5 C. & P., 421; 8 C. & P., 373.

Henry, contra.—The learned Judge who tried the cause put it to the jury whether there was contributory negligence. The plaintiff had nothing to do with the pipe which caused the explosion; it was not connected with his meter. The company had no right to turn gas into that pipe without giving the plaintiff notice. The mere fact of the lapse of time, with the explosion, is *prima facie* evidence of negligence on the part of the company.—Torrey's evidence is to the effect that these soft lead pipes are apt to be gnawed by rats or mice, and that they are frequently cut or pierced by nails.

The notice given to defendant's servant was within the scope of his authority. He was setting up a meter to supply gas to plaintiff's house under the defendant's direction when his attention was called to the open pipe. Plaintiff was not aware that there was any way that gas could get into that pipe. One of defendant's own servants and witnesses swore that, if he had been sent to put in a meter, and had found that pipe open, though unconnected with the meter, he would have considered it his duty to plug it. That evidence went to the jury.

The dangerous nature of the article in which defendants deal, requires extra carefulness on their part.

Cites *19 L. J., N. S.*, 390; *Fish. Dig.*, 6045.

There was no contributory negligence to disentitle plaintiff to recover. Each case must rest upon its own merits. The defendant is not relieved because the plaintiff knew there was danger; *12 Q. B.*, 439. While the dangerous character of the gas requires greater care on the part of the defendants, the plaintiff is not to be held in fault while he exercises care commensurate with his capacity or knowledge of the character and use of the gas; *1 Hilliard on Torts*, 160. The case of *Holden v. Liverpool Gas Company*, cited by the other side, is different from this, inasmuch as in that case there was gas always within the walls of plaintiff's house, up to a stop-cock between the wall and the meter. Plaintiff there turned on the gas himself. (Refers to dissentient opinion of McCULLY, J., on former argument). Cites *4 F. & F.*, 324.

Thompson follows.—The company, dealing in a dangerous and explosive material, are bound to exercise care, whenever they turn it on in any pipe, to know where it is going. The case already cited from *4 F. & F.*, 324, was decided on that principle. If *Mr. Buist* had had in his office a plan shewing that pipe leading from the factory into the office where the explosion took place, and the stop-cock, this explosion need not have taken place. He swears that on the day after the explosion he had the branch pipe from the factory to the office dug up from the lane, and the pipe plugged. That should have been done before the gas was turned on. He says he knew all along the pipe was there, but did not expect to find the stop-cock on the

branch. In the case cited by the other side from *3 C. B.*, it was in consequence of the plaintiff failing to prove either practice of, or obligation on, the company to shut off the gas by stop-cocks on the street that he could not recover.

The case is stronger now than it was on the first trial. We have in evidence the rules of the company, shewing that the company claimed the right to inspect the meters, fittings, and burners. Notice to the agent was notice to the company; *Angell & Ames on Corp.*, 305. There is evidence of notice to a man who is the proved agent of the company.

There is no evidence of contributory negligence on the part of *Mrs. Tremaine*. She swears that she believed the escaping gas came into the room through an open door and window which she closed, and that when she found subsequently that gas was escaping in the room, she went to a neighbor for assistance. There is no evidence of the book of rules of the company coming to the knowledge of the plaintiff or his wife.

The evidence of *Mr. Buist* shews that it was the duty of the workman sent by the company, finding a pipe open thro' which gas would escape when turned on, to close the pipe. He says in so many words that "he would be at liberty to do so."

McDonald, Q. C., in reply.—The evidence of Torrey as to what he would consider his duty proves nothing. There is evidence here that the company took the extreme precaution, when the gas was turned off from the buildings, of stopping up all the pipes, turning the stop-cock in the office so tightly that it would be difficult to open. Their pipe conveying gas to the office did not enter the house, but was brought up alongside the chimney, and any escape from the company's pipe would be into the open air. Tremaine was aware of the condition of the pipe which caused the explosion, but never notified the company.

There is sufficient evidence that the book of rules reached the plaintiff. *Buist*, the manager, swears that a copy was given to each consumer.

The company had no authority to enter the room to repair the pipe. They would have been trespassers the moment they entered the premises, having no meter there.

JAMES, J., now (March 6th, 1877), delivered the judgment of the Court :—

On the 2nd day of October, 1871, a violent explosion of gas from the works of the defendants took place in the premises in the city of Halifax occupied by the plaintiff as a dwelling house as tenant of *John H. Dodge*, whereby the building was seriously injured and severe personal damage inflicted on the plaintiff's wife.

Two actions were thereupon commenced against the company, one by *Mr. Dodge*, for damage to the building, and the other by the present plaintiff, in both of which suits the defendants were sought to be held liable on the ground that the explosion was caused by the culpable negligence of their servants.

The former action was tried before Mr. Justice WILKINS and a special jury, who found a verdict for the plaintiff in opposition to the opinion of the presiding Judge, for \$3000 damages. This verdict was carefully reviewed on a rule *nisi* for a new trial, and was set aside by a decision of the Court, delivered by the learned Judge in Equity, to which he referred in a subsequent judgment delivered by him in this cause, for which reason I now advert to it as part of the proceedings in this case. The present suit was commenced 6th of April, 1872, and tried 7th November following, before the late lamented Mr. Justice McCULLY. A motion for a non-suit was made at the trial which the Judge refused to grant, and after hearing witnesses on the defence, the Jury were recommended to find a verdict for the plaintiff, which they did in the sum of \$3000, and a rule *nisi* for a new trial was granted. This verdict after full argument was set aside by the majority of the Court, consisting of the Chief Justice, the Judge in Equity and Judge WILKINS, Judge McCULLY dissenting. The judgment of the majority was delivered by the Judge in Equity. The verdict was set aside on the 10th March, 1873, and the cause was brought on again for trial before Mr. Justice DESBARRES and a special Jury in April, 1876, and a verdict again found for the plaintiff in opposition to the learned Judge's opinion, in the sum of \$3000—a rule to set aside the second verdict

was argued on the 7th February last past before Judges DES-BARRES, WILKINS, McDONALD and myself.

I have carefully studied the three judgments above referred to, which are now in my hands, and the evidence given on both the trials which have been had in this case. I find no important differences between the verdict given on the first and that on the second trial, none sufficient in my opinion so to distinguish them as to give the plaintiff a better right to sustain the present, than he had to uphold the former verdict. Having arrived at this conclusion, in which I believe the whole Court will concur, the decision given at the former argument will necessarily govern the Court in its decision upon the present rule. Here I might stop, but having considered it my duty to examine the authorities in order that my own mind might be satisfied with the propriety of the decision of the Court which it falls to me to deliver, I conceive it to be my duty, without repeating what has been already said in former decisions, to make some observations which may be useful upon the law of a case which has naturally excited no little public interest,—the more especially as the present decision, if not made the subject of appeal to a superior court, will probably settle the law on this subject for some time to come. From the period when the gas company went into operation until about eighteen years ago, a period of some ten or fifteen years, they assumed and exercised the duty of supervising and keeping in repair not only the main pipes by which their gas is conveyed through the streets and the lanes of the city, and the branch pipes through which it passes across the sidewalks and through the walls of the buildings, but also the interior tubing which connects the pipe with the metre, and extends beyond the meter to those parts of the building where it is consumed in the production of light. Having undertaken this responsibility they had not only the right, but their own interests, as well as those of the public, required that they should exercise the right, of visiting and inspecting the condition of every part of their works both within and without their buildings, almost from day to day, in order to prevent the occurrence of accidents of a character extremely dangerous to life and property.

The extent of the responsibility thus assumed at that time by the company will appear from the decision at *nisi prius* of POLLOCK, C. B., in the late case of *Mose v. St. Leonard & Hastings' Gas Company*, reported in 4 *Foster & Finlason*, 321. In summing up this case to the Jury, the Learned Chief Baron told them "that it was the duty of all Gas Companies to use due and reasonable care to prevent mischief from the escape and explosion of gas ; and that there was evidence in the case from which the jury might come to the conclusion that there had *not* been such due and reasonable care; and, without saying that the Companies ought every day to send men over the entire district to ascertain whether there was any escape of gas from the mains, at all events it was for the jury to say whether the not sending any one for several days, during which, according to the evidence, the escape of gas, and the danger of an explosion, was discoverable—was such reasonable care as the companies were bound to keep up. It was clear that there ought to be some system of supervision, and that men should always be in readiness to repair any leakage that might be discovered, and that anything short of those precautions against accidents, which were thus liable, amounted to neglect, for which they would be liable."

This case was cited on the first argument from an abstract of it in *Fisher's* digest, which, from the reference to it in Judge McCULLY's decision, appears to have been inaccurate. We have since got the report, which shews clearly that it only extended to the main or street pipes in which the defect in that case had existed, and therefore it had no reference whatever to a case like the present where the defect existed within the walls of a building. But the case shows how great is the responsibility of gas companies for the security of their works and the extreme vigilance required of them in order to guard against accidents. If such were the responsibility of the company during the earlier years of its existence, it necessarily devolved upon them the right and the duty of keeping up a constant scrutiny of their works, not only in the streets and lanes of the city, but in the workshops, dwelling rooms and dormitories of the people.

From this responsibility arose a great danger to the com

pany and to the public, and a very great inconvenience to the tenants of dwelling houses. The Company being responsible, the landlords and their tenants were not, and they might be careless and criminal in their management of the gas, whereby the Company might at any moment be involved in heavy losses and the city exposed to the constant danger of conflagrations from explosions of gas, and the inhabitants exposed to the annoyance of being liable every day and at all hours of the day to domiciliary visits from the servants of the Company, armed with the legal right to penetrate without asking leave into the most private rooms in the dwelling house. Not only does not such a state of the law prevail in England, but it would be impossible, unless required by the very gravest necessity, among a people so sensitive to personal *desagremens*, and so peculiarly jealous of the privacies and sanctities of home life as the English.

The Company for their own interest, and because the practice was dangerous to their interest, changed their usage some eighteen years ago, and adopted that which prevails in Great Britain; they abandoned all property in and supervision over all the tubes and fittings inside of the buildings, extending their pipes only one inch within the walls, so as to enable the occupants or their servants to make the necessary connexions, leaving the responsibility of looking after the safe condition of these, where it is best for the public interest that it should rest, upon the owners and occupants of the buildings, whose own interest would induce them to exercise, for the safety of their own lives and property, a constant and vigilant supervision of the dangerous apparatus continually exposed to their own observation. This supervision must necessarily be far more perfect and effectual than any which a public Company could possibly exercise. The meter and that alone is supplied by the Company. It is taken to the place where it is needed, on the application of the tenant for use of the gas. It is removed when that use ceases. The Company have doubtless the right to send their servants periodically or on being informed by the tenants of an escape of gas, to that part of the building where the meter is situated, for the purpose of inspecting it, but they have no right to go

further or intrude into the private rooms of the family, as they would need to have done to ascertain the defect in the interior pipe from which this accident arose. If they had attempted to do so they might have been resisted by force or made liable to an action of trespass.

This I take to be the state of the law as laid down in *Holden v. The Liverpool New Gas Company* and the other cases cited in the previous argument by defendant's counsel and adopted by the Judge in Equity in his two previous decisions. The last mentioned case bears a remarkable similarity to the present. It was a unanimous decision of the whole court, and, until it is over-ruled, it must govern the decisions of this court, and must be held to be decisive in this case. In my opinion it establishes the law of the case, as I have endeavored to shew, on the only foundation on which it can permanently rest, the foundation of reason, of just regard alike for private rights and public interests. I think the rule for a new trial should be made absolute with costs.



GRAY v. McKEEN. NELSON v. FULTON.

It is not necessary to move the Court for leave to enter judgment under R. S., ch. 94, sec. 111, where plaintiff has failed to give security for costs within twelve months after service of a rule therefor.

Sedgewick (January 6th, 1877), moved for judgment in both the above suits on the ground that orders for the filing of security for costs by the respective plaintiffs had passed, and that a year had elapsed without the security being filed; R. S., ch. 94, sec. 111.

YOUNG, C. J.—Judgment follows as a matter of course, without moving the Court, at the end of a year.

IN RE ESTATE OF ROBT. H. BATH.

The acting executor of R. H. B. and the acting executor of E. A. B., his wife, (R. H. B. having been executor of C.) made a memo. as follows:—"It is mutually agreed between J. W., the acting executor of R. H. B., and myself, the acting executor of Mrs. R. H. B., that the settlement made by him on the 18th day of December last, at the Probate Court at Annapolis, to abide the decree then made, by his paying over to me one hundred dollars, part of the per-centage or commission allowed in said settlement, which sum I have this day received."—Sgd., "J. C. T."

J. C. T., acting executor of E. A. B., had always objected to the settlement referred to in the memo.

Held, that the memo. did not estop the Judge of Probate from opening the accounts.

This was an appeal by the Executors of Eliza Ann Bath from a decree of the Judge of Probate in Annapolis under the following circumstances:—One Clark died at Bridgetown leaving considerable estate, and having appointed Robt. H. Bath one of his executors. Bath died afterwards, leaving Wheelock and Longley his executors, who thereby became the executors of Clark. At the same time he, by will, devised all his property to his widow, whose executors were J. C. Troop and another. The estate of Clark had never been severed from that of Bath, and neither the estate of Clark nor that of Bath had been settled. On the contrary, the estates of Clark and of Bath were by the executors of Bath both inventoried together as one estate.

The decree appealed from, sets out that on April 14, 1875, the executors of Robt. Bath were, at the instance of the executors of Eliza A. Bath, the widow, cited to appear for the purpose of finally settling and accounting of the estate of R. H. Bath and transferring the property and securities in their hands belonging to said estate; that at the meeting of the Court for the purpose Wheelock was present as executor of R. H. Bath, with his proctor; J. C. Troop, acting executor of Eliza Ann Bath and his proctor; that several estates appear to have been involved, viz: Estates of John Clarke, of R. H. Bath, and of his widow, Eliza Ann Bath, which were all treated as one up to the time of the death of Mrs. Bath; that there appeared to have been two several accountings in the estate of R. H. Bath by his executor, Wheelock, the last of which was had on Dec. 18, 1872, on which is shown a memorandum

signed by Norman Clarke, Miner Clarke, and Rachel Troop, by her attorney, J. N. Clarke, signifying their approval thereof: which memo. is in these words:—"We, the undersigned, having examined the within accounts, and, finding them correct, agree to their final passing in the Probate Court. * * * This account shows a balance of \$243.55 in the hands of Joseph Wheelock, executor of R. H. Bath"; that at this accounting J. C. Troop was present and protested against it as acting executor of Mrs. Bath; that on February 3, 1873, J. C. Troop, the said acting executor, signed a memorandum drawn up in the handwriting of Joseph Wheelock, in the words following:—"It is mutually agreed between Joseph Wheelock, the acting executor of R. H. Bath, Esq., and myself, the acting executor of Mrs. R. H. Bath, that the settlement made by him on the 18th day of December last at the Probate Court at Annapolis, to abide the decree then made, by his paying over to me one hundred dollars, part of the percentage or commission allowed in said settlement, which sum I have this day received." The decree goes on to say that there would be no difficulty in decreeing the liability of Wheelock but for this memorandum signed by Troop, but closes with these words:—"I am constrained to say that the several payments made by said Wheelock, as acting executor of R. H. Bath, as shown in his accounts, though made contrary to the notices and protests of Mr. Troop, the acting executor of Eliza Ann Bath, were by said memorandum concurred in by said J. C. Troop, and that the said settlement cannot be disturbed."

The whole inquiry seemed to turn on the question whether the citing parties were estopped by this memorandum. The evidence of Wheelock was that the memorandum was merely a receipt for commissions paid over to Troop, on the consideration that part of the moneys collected by him belonged to the estate of Mrs. R. H. Bath, of which Troop was executor, and Troop says,—“The receipt given by me to Mr. Wheelock for \$100, was given solely for the amount of \$100, as an account of moneys received from him for estate of Mrs. Bath.

After argument by *Weatherbe, Q. C., T. Chesley, and C. S. Harrington*, for appellants, and *Rigby, Q. C., and J. G. Foster* for respondents:—

YOUNG, C. J.—We see nothing to do in this case but to send it to a Master, with the opinion that that memorandum does not estop him from opening the accounts.

Costs reserved.

McDANIEL v. McMILLAN.

C. made an assignment under the Insolvent Act of 1869, assigning, *inter alia*, a debt of \$100 due him by Mrs. O'B. Subsequently C. married Mrs. O'B. After the marriage C.'s assignee pressed for a settlement of the \$100 debt, and Mrs. C. (formerly Mrs. O'B.) gave the assignee a note for the amount, in which the defendant joined as surety.

Held, that the defendant was not liable on the note, as there was no consideration for Mrs. C.'s making it.

This was an action to recover the amount of a promissory note, made under the following circumstances:—One Cooper, having failed in business, made an assignment under the Insolvent Act of 1869, assigning, *inter alia*, a debt of \$100 due by a Mrs. O'Brien. Cooper, the insolvent, subsequently married Mrs. O'Brien, and after the marriage the assignee of Cooper's estate obtained a note, signed by Mrs. (O'Brien) Cooper and by the defendant, as security. The defendant pleaded want of consideration and fraudulent representations made to him by the assignee, to induce him to sign the note. The cause was tried before Mr. Justice SMITH, at Antigonishe, in June, 1876, and a verdict found for defendant. A rule *nisi* to set the verdict aside was granted and argued before five Judges, January 22nd, 1877.

Henry, in support of rule.—There are two questions here: first, whether there was consideration for the note; and, secondly, whether there is any evidence of fraud. There is nothing to show want of consideration. The marriage of Cooper and O'Brien does not extinguish the right of action of the assignee or deprive him of the right of action previously vested in him by Cooper's assignment. I know of no authority to shew that the assignee could not sue the woman after her marriage, joining the husband, Cooper. Certainly he could proceed in Equity.

YOUNG, C. J.—Then would Cooper not be made to pay the same amount a second time ?

Henry.—If the Insolvent improperly received the amount of a debt due the estate, could not the assignee recover? As to the extent to which forbearance against a third party constitutes consideration for a note, cites *Addison on Contracts*, 11; *L. R.*, 5 *Q.B.*, 449. In the case there reported it was held that, though there was no liability at all on the part of the third person, yet the promise to forbear proceeding against such third person was a sufficient consideration for a note. We should be in as good a position here as if the woman had not signed the note.

There is no evidence of fraud or fraudulent representation here.

YOUNG, C. J., and WILKINS, J.—The assignee had no right to proceed against her (or her husband, or both).

Rule *nisi* discharged.

OWEN v. LYNCH.

Where a deed of real estate was prepared and executed to give title to E., but E. failed to complete the purchase, and subsequently H. & G. purchased the real estate, and by agreement between the parties, the deed to E. was recorded simultaneously with a deed from E. to H. & G., in action of ejectment by purchaser at Sheriff's sale, under judgment recorded against E. previously to the recording of the above conveyances.

Held, that E. was a mere conduit pipe to convey title from the vendors to H. & G., and that the judgment against him did not attach to the real estate in question.

This was an action of ejectment, brought under the following circumstances:—The Churchwardens of St. Luke's, Annapolis, bargained to sell certain lands to one Rice, and deeds to Rice were prepared but not delivered. Rice was to give a mortgage to the Churchwardens for a portion of the purchase money. The sale was not completed, and after some time the Churchwardens bargained to sell the lands to one Hall and one Gamage, and it was arranged that the deed to Rice, already prepared, should be used in the conveyance, Rice executing a

deed to Hall and Gamage. These deeds were duly executed and recorded together with a mortgage from Hall and Gamage and their wives to the Churchwardens. The lands were subsequently put up for sale by the Sheriff, under an execution issued by a judgment creditor of Rice, who had recorded his judgment before the deeds to and from Rice were recorded. The lands were knocked down to the plaintiff, who brought this action to eject the tenant of Hall and Gamage. Defendant's lessors were let in to defend the action and pleaded the facts of the conveyances above set out as an equitable defence, on the ground that there was no property in these lands in Rice to which the judgment would attach. The cause was tried before the learned Judge in Equity at Annapolis and a verdict taken for plaintiff, by consent, subject to the opinion of the Court on the equitable plea. The cause was argued February 15th, 1877, before Sir W. YOUNG, C. J., and WILKINS, McDONALD and JAMES, JJ.

Rigby, Q. C., for plaintiff.—Cites *R. S.*, ch. 79, sec. 22, p. 263. There was for a moment title in Rice, and that fact is sufficient. The defendant's lessors should have known that this judgment was recorded against Rice. There is no doubt the mortgage to the Churchwardens is good against the judgment, and the plaintiff is ready to pay it, because it is for part of the purchase, but not because the deeds are simultaneous; *Freeman on Judgments*, 373. It is impossible to formulate any defence on the part of Hall and Gamage under the equitable plea. If the title passed to Hall and Gamage, there was title in Rice. If Rice had no title, these defendants have no title. The equitable plea sets up that, because the mortgage to the Churchwardens is outstanding, and because Hall and Gamage hold a prior recorded judgment, the plaintiffs cannot eject.

The COURT :—*Rice* was only a conduit pipe. You cannot succeed.

Graham, (with whom was *Weatherbe, Q. C.*), contra, was not called upon.

Judgment for defendants.

FORD v. BROWN.

Allegation in defendant's affidavit that "the pleas are not false, frivolous and vexatious, and are not pleaded solely or principally for delay."

Held, of no effect in opposing motion to set aside pleas under R. S. Ch. 94, Sec. 133.

Querre, whether that or the contrary allegation in plaintiff's affidavit on such motions is necessary.

This was an appeal from a decision of Mr. Justice WILKINS at Chambers, setting aside pleas under the Statute as false, frivolous and vexatious.

Rigby, Q. C., in support of appeal.—There is a positive allegation in defendant's affidavit that the pleas are not false, frivolous and vexatious, and are not pleaded solely or principally for delay.

YOUNG, C. J.—That goes for nothing, just as the contrary allegation by plaintiff, unless supported by the facts.

Rigby, Q. C.,—Then those allegations may as well be left out in future cases.

YOUNG, C. J.—I think they might as well.

Rigby, Q. C.—Plaintiff claims exchange and re-exchange, amounting to over \$100, while the debt was a simple debt, if any, between two merchants in Yarmouth.

YOUNG, C. J.—We think they are not entitled to that. The judgment should be reduced by those charges.

Rigby, Q. C.—Then we should have the costs of this argument.

Henry, contra.—We are entitled to the costs, for this motion should have been to reduce the judgment.

Appeal discharged with costs. Plaintiff's counsel to reduce the amount in entering judgment, on consultation with defendant's counsel.

RUSSELL v. GRANT ET AL.

Where plaintiff sued two out of three makers of a joint and several promissory note, alleging the making by the third, but not alleging that he was out of the jurisdiction of the Court,

Held, that this was a fatal objection to plaintiff's declaration, and that it did not require to be pleaded in abatement, or raised by demurrer.

Plaintiff sued two out of three makers of a joint and several promissory note, setting out in his declaration that the two defendants, together with one G. S., had made the note. Defendants pleaded several pleas, but did not plead in abatement or demur. The cause was tried before Mr. Justice McCULLY, in April, 1875, and a verdict found for defendants. A rule *nisi* to set it aside on the usual grounds was taken out under the Statute, and argued on the last day of the July Term, 1875, before three Judges, Sir W. YOUNG, C. J., and WILKINS, and McDONALD, JJ. The objection that the action could not be brought against two out of the three joint and several makers, was not taken on motion for non-suit at the trial or at the argument. The three Judges who heard the argument differing in their opinions, the cause was re-argued, March 13th, 1877, before Sir W. YOUNG, C. J., and DESBARRES, WILKINS, McDONALD, and SMITH, JJ.

S. A. Chesley (with whom was *Russell*), opens in support of rule.

YOUNG, C. J.—You have sued out two of three joint and several makers.

Chesley.—That point has never been taken on the part of defendants, either on the motion for non-suit at the trial, or at the first argument. The non-joinder could only be taken advantage of by plea in abatement, *R. S.*, Ch. 94, Sec. 100, and Sec. 351. In this case perhaps the defendant might have demurred.

The COURT.—The objection is fatal and a plea in abatement was not necessary, as your declaration sets out that the note was made by the third party, and does not set out that he was out of the jurisdiction.

Thompson and *Ervin*, counsel and attorney for defendants, agreed to a non-suit on the recommendation of the Court.

IN RE AMERCEMENT OF CAPE BRETON CO.

Neither the Dominion Acts of 1868, ch. 40, and of 1873, ch. 46, nor R. S., ch. 21, empower the Supreme Court to amerce a County for charges incurred in calling out the active militia, under the Dominion Act of 1873, ch. 46, to quell a riot.

Henry (Saturday, March 17, 1877), moved to amerce the County of Cape Breton for expenses incurred in calling out the active militia to quell riotous proceedings of striking miners and protect life and property, in July, 1876. Cites Dominion Acts of 1868, ch. 40; Acts of 1873, ch. 46, sec. 27; R. S., ch. 21, sec. 6,

YOUNG, C. J., now (March 26th, 1877,) delivered the judgment of the Court:—

Under the Revised Statutes, ch. 21, secs. 6 and 54, we have been moved to amerce the County of Cape Breton in the sum of \$622.81, on numerous affidavits touching the strike and riotous proceedings of the miners at Sydney in July last. The affidavits of the Custos and Sheriff of the County, and of *Col. Read*, shew that a highly meritorious service was performed and peace restored by the aid of the militia, duly called out under the *Dominion Acts of 1868*, ch. 40, and of 1873, ch. 46, sec. 27; and *Col. Read* testifies that the account contains only the proper and legal charges allowed by the Act. The Dominion Act directs that the officers and men employed shall receive their pay from the municipality in which their services are required. But there being no municipality in Cape Breton, the application was made to the Grand Jury, who refused to vote or recognize the amount as a county charge. Now, by the 6th sec. of ch. 21, R. S., if the Grand Jury neglect or refuse to make a presentment for certain specified purposes, the Justices in session should amerce the county therefor; and, by the 54th sec., if the Sessions shall neglect to make such presentment, the Supreme Court shall amerce the county in such sum as shall appear to them upon affidavit of a ratepayer to be necessary for such purposes. Among these, by sec. 6, are, "paying extraordinary expenses ordered by the Sessions to constables, and incurred in exe-

"cution of their duty in cases of riot or felony;" and "paying allowances to special constables ordered by the Sessions, about executing or assisting, or trying to execute, warrants for felony or misdemeanor." The expenses in question cannot be said to have been ordered by the Sessions, though the application for aid was made in writing by the Custos, under the Dominion Act of 1873, to the senior officer of the active militia at the locality, and though the men when employed are declared by the Act to be special constables, we think that we would not be justified in amercing the county for the amount. As the Grand Jury, however, under the 4th sec. of ch. 21, have the power, in conjunction with the Sessions, of presenting any sums of money necessary in their judgment for any public purpose within the county, and as the preservation of the public peace and the putting down of riot and disorder are among the first necessities of civil government, we regret that some provision has not been made for the payment of these men, who discharged a perilous and important duty, to which they may be again called and may refuse to come. The attention of the Dominion and Local Governments will doubtless be directed to this case.

MORRISON ET AL. v. THOMPSON.

Where the Judge, in charging the jury, told them that, "putting out of consideration all admissions that had been contradicted, which on that account he thought they should dismiss from consideration, the plaintiffs were in his opinion clearly entitled to recover,"

Held, that this was not a misdirection.

Where the plaintiff gave evidence, uncontradicted, that defendant, the captain of a vessel, told her to send her goods to a certain wharf, and that she sent them there,

Held, that there was evidence of a constructive delivery to the defendant, which imposed on him the duty of looking after plaintiff's goods and taking them on board.

This was an action to recover goods from defendant, alleged to have been delivered to him as a common carrier, by plaintiff's wife, before marriage, to be conveyed from Boston to a port in Minas Basin.

The cause was tried before Mr. Justice WILKINS, at Truro, in June, 1876. A verdict was found for plaintiff, and a *rule nisi* to set it aside on the usual grounds taken out under the Statute and argued February 19th, 1877, before Sir W. YOUNG, C. J., and DESBARRES, WILKINS, and SMITH, JJ.

McDonald, Q. C., in support of rule.—There is no evidence of delivery of the goods in question to defendant. The evidence of one witness is that the box was put on the wharf 150 or 200 feet from the schooner. Marks, a sailor on board, and the captain, swear that everything received on board was delivered. *McLaughlan on Shipping*, 353; *1 Parsons on Shipping*, 583, 184, n., 185, n. Plaintiff's own witness, the expressman, could not testify that he delivered the box to any one belonging to the vessel. The only evidence tending to prove delivery is an admission of the captain, who stated to plaintiff's wife that he supposed he had the box on board, but surely that admission, made under a mistake, cannot bind him; *6 C. B., N. S.*, 906. The admission, after all, is not the captain's; he asked the man Marks if they came on board, and Marks said they had and were stowed away, upon which the captain asked the plaintiff's wife if she wanted to see them, and she said, if they were properly stowed, she did not wish to see them. *L. R., 3 C. P.*, 449; *3 Campb.*, 414.

The judge withdrew from the consideration of the jury the contradictory evidence. The only uncontradicted evidence is that the box was put down on the wharf, not near the vessel, but that is certainly not evidence of delivery, under the case above cited.

Graham, contra.—There is an uncontradicted admission of the mate that the box was on board. It is strange that the theory that the box was never delivered was not adopted by defendant till months after it was missed, when a suit was threatened. The admission in presence of Mrs. Morrison that the box was on board and stowed away, which induced her to desist from looking for it, is conclusive against the defendant; it is an estoppel; *1 Taylor on Evidence*, 690. The captain accepted Marks' statement. The captain told Mrs. Morrison to send

the goods to the wharf where they were sent ; this makes a delivery, as where a carrier directs goods to be sent to a particular booking office ; *Story on Bailments*, 488, n.

McDonald, Q. C., in reply.—The learned Judge misdirected the jury in telling them that the captain, defendant, after his conversation with Mrs. Morrison, was bound to instruct his officers to keep a lookout for the articles about to be sent. On estoppel, cites *Bigelow on Estoppel*, 416.

DESBARRES, J., now (March 26th, 1877), delivered the judgment of the Court :—

This was an action brought by the plaintiffs, *Andrew Morrison* and *Matilda Morrison*, his wife, who by the first count in their writ and declaration allege that said *Matilda Morrison*, while unmarried, delivered to defendant, and defendant received from her, certain goods belonging to her, to be, by him safely and securely shipped and carried in a vessel called the "*Glenrose*" from Boston to Economy, N. S., and there deliver for her, the said *Matilda Morrison*, (certain perils and casualties only excepted) for freight paid by her to defendant ; that, although not prevented by any of the perils mentioned, defendant did not safely carry and deliver the goods, and the same were lost. There was also a second count for the conversion of certain goods by defendant of *Matilda Morrison*, while unmarried; which are particularly described. To the first count the defendant pleaded that *Matilda Morrison*, while unmarried, did not deliver to him, nor did he receive from her, the said goods for the purpose alleged ; and to the second count, that he did not convert to his own use the goods of *Matilda Morrison*, while unmarried, or wrongfully deprive her of the use thereof as alleged. This cause was tried before Mr. Justice WILKINS, and there was a verdict for the plaintiff for the value of the goods lost. A rule was taken under the statute to set the verdict aside on various grounds, two of which only were relied upon at the argument,—1, That there was no evidence of the delivery of the goods to the defendant ; and, 2, Misdirection. Viewing this as a case resting altogether on the first point, in which no question of law is involved, I have thought it best to refer to the

main features of the evidence on both sides, in order that we may be able to decide whether the jury were warranted in arriving at the conclusion they did.

The deposition of *George D. Kemp*, an expressman, residing in Boston, was put in, who testified as follows :—I recollect the "*Glenrose*" being at Fort Hill wharf in Boston. I delivered stuff at the vessel for *Matilda Crow*; myself and my partner loaded and unloaded the stuff; we received the stuff from *Matilda Crow* in person. She delivered to us a trunk and box, to be delivered on board the schooner "*Glenrose*" at Fort Hill wharf. We delivered them at this vessel, both the trunk and box. It looked to me as if they were loading freight on board the vessel. There was one man on the wharf—we delivered both the trunk and box together. We took no receipt. In his cross-examination he said, I asked the man on the wharf if that was the schooner "*Glenrose*;" he said it was. We took the trunk and box off the truck and told him there was a trunk and box for him, and then drove away. I am sure it was Fort Hill wharf. *Miss Crow* told me to deliver the things at Fort Hill wharf. I did not look at nor examine her name. There was only one schooner at the wharf. I have no means of knowing that the vessel at the wharf was the schooner "*Glenrose*" except what the man said, and the directions *Miss Crow* gave me.

Matilda Morrison, called as a witness in her own and her husband's behalf, testified that being in Boston in 1873, and hearing that the defendant's schooner, the "*Glenrose*," was there, she called on defendant at a certain house, and expressed her desire to send her goods, consisting of a box and trunk, to Nova Scotia; that defendant, with whom she had been previously acquainted, told her that his vessel, which he named, was lying at Fort Hill wharf, and directed her to send the things which she described to that wharf; that she delivered to *Kemp*, an expressman, her trunk and box addressed to *Andrew Durning*, Economy, who, defendant told her, had flour in the vessel; that defendant promised to deliver her goods at *Durning's*, and after sending them to the wharf, she saw defendant on board the vessel, and asked in presence of one *Marks*, a seaman in the vessel, if her goods had been

placed on board ; that defendant turning to *Marks*, asked him if those things had come, who said that a box and large black trunk had been taken on board of the vessel for *Andrew Durning*, and stowed away in the hold, and on being so informed, the defendant asked her if she wanted to see them ; she replied, she did not want to see them if they were safely stowed away, and at the same time paid the freight therefor to the defendant. That she remained three or four weeks in Boston after that, and then returned to her home in Nova Scotia, and was shortly afterwards married, and received her trunk with its contents, but never received the box, the subject of the present suit or its contents. *Mrs. Morrison* also stated that after her marriage and in presence of her husband, she saw the defendant at his house, and asked where the box was, and if he knew what had become of it. Defendant asked her to wait till the mate came, and that probably he might be able to tell her something about it. She waited until the mate came in, who said *he had delivered it*. After some conversation between her husband and the mate, the defendant said, if the thing is lost, it is through the mate's carelessness. That defendant said he did not deny having received the goods in Boston, and promised he would come up to Economy where the cargo had been discharged, and look for the box, which he failed to do. In her cross-examination she said she did not know *Marks* before she saw him on the deck of the vessel. That she saw him on the deck of the vessel. That she saw him there a few hours after the delivery of her goods to the expressman. *John More* says that the black trunk was delivered to him from the vessel for *Durning*, the brother-in-law of *Mrs. Morrison* ; that he received it from the mate in the absence of the captain, who said there was a big box covered up and he could not get at it, and he therefore received nothing but the trunk ; that he heard defendant talking to *Mrs. Durning* before he got the trunk, and that he said there was a trunk and big box there, meaning on board the vessel. He was quite certain the conversation between defendant and *Mr. Durning* was before the delivery of the trunk. *Alexander Morrison*, one of the plaintiff's witnesses, said defendant told him he was afraid he would not find the box, and that he would call up and see them

about it some day; that he again saw defendant at Big Village, and he then said he was going to Economy the next day and would try and trace out the box and let him know, remarking that several things were lost in the vessel by the blunders of the mate. *Charles S. Durning* said he talked with defendant after the loss of the box; that he, witness said to defendant he had been told *Mrs. Morrison* had paid the freight on the box; he replied he could not deny it, and that the mate had made several blunders in relation to some barrels of flour. Defendant admitted *he had seen Mrs. Morrison on board the vessel at Boston and that she asked about the box and that William Marks was the only person on board the vessel at the time.*

This being all the evidence produced in support of the plaintiff's case, I will now refer to that on the part of the defence. The defendant, *Andrew Thompson*, being called, admitted that he was the owner of the schooner "*Glenrose*" when at Boston in 1873, and recollected seeing *Mrs. Morrison*, then *Miss Crow*, at the vessel at Fort Hill wharf that she told him she wished to send a box and trunk to Economy, and described what was to go, and he took 50 cent from her for freight; that she did not say the thing had been sent, and he did not recollect any reference being made to *Marks*; that to his knowledge no box of the description of the lost box came to his vessel; that the vessel called at Five Islands on her return, but he did not know whether any delivery was made there. *Fulton*, now in California, took the vessel to Londonderry and Economy. Never heard of the loss till November or December. No man in Economy had heard of the box, and he had never found it. That the things were not on board the first time *Mrs. Morrison* came to the vessel; that she must have gone to the Custom House to find where the vessel lay that he no doubt had acknowledged to *Miss Durning* that he had the box. He supposed he had a trunk and large box. That the plaintiff never was on board more than once to his recollection. He had heard the witness state that he spoke of the mate's blunderings and bunglings, but that he did not say that. *Wm. Marks* says he was on board

the schooner in July, 1873. She was then at Fort Hill Wharf, Boston, taking in freight. Did not recollect *Mrs. Morrison*. Never told defendant there was a large box belonging to her stowed away on board the vessel. No such box as that lost came to the vessel that he knew of. That he recollected the black trunk addressed to *Durning* at Economy, which he and *Fulton* took on board from the wharf. Did not see it left on the wharf by any expressman, and did not hear the expressman inform any person on board the vessel it had been left. It alone was on the wharf, which was full of freight for the "*Glenrose*" and other vessels. That he and *Fulton* were looking around the wharf when they found the trunk, and if they had not done so they would have missed it, all being mixed up together on the wharf. There was no other vessel there bound to Economy. The special duty of the mate was to look after the freight as it came. The mate helped me to take the box on board. His duty was to keep the freight for our schooner as much separate from the others as possible. Witness also said, "I have no recollection of what *Mrs. Morrison* stated in reference to me. I recollect defendant asking me about the box. I delivered *More* the black trunk. I did not say in presence of *More* that I had delivered both trunk and box. I did not say: 'I will state on my oath that I delivered both.'" On being re-examined the witness stated,— "When the captain asked me about the box he took me by surprise, and I said I knew nothing about the box." This closed the evidence for the defence.

John More, being recalled by plaintiffs to rebut, stated that he had heard *Marks* say on election day he would take his oath he put both box and trunk on board the vessel.

In submitting this case to the jury the learned Judge told them, that, putting out of consideration all admissions that had been contradicted, which, on that account, he thought they should dismiss from consideration, the plaintiffs were, in his opinion, clearly entitled to recover on the uncontradicted facts, and in view of the admissions made by defendant. To this portion of the charge the learned counsel for the defendant took exception, contending that it was a misdirection, and that, as it was to be presumed,

that the jury, in considering the case under the instructions thus given them, had directed their attention solely to, and found their verdict upon, the uncontradicted evidence produced by the plaintiffs, which he insisted was not of itself sufficient to make the defendant legally responsible for the lost goods, the verdict, for that reason, ought to be set aside. While I cannot help thinking it would have been better to have submitted the whole of the evidence to the jury, such as it was, and told them to exercise their own judgment and discrimination as to what they believed to be true and what they considered false, and to decide accordingly, I am not at all prepared to admit that the instructions given to the jury in any way precluded, or were intended to preclude them from considering the whole of the evidence if they thought fit to do so, and that a verdict found under these instructions must be presumed to have been found on that part of the evidence only to which their attention was more particularly directed. The jury had a right, and it was their especial duty, to consider the contradictory evidence and give effect to their own views in relation to it as well as the rest, and I have no doubt they did so, and decided according to the impression it made on their minds. Looking at all the evidence in this case, which I have carefully considered, I must say that I have failed to see any grounds upon which the verdict of the jury can be disturbed. My own opinion is that the verdict rendered is in accordance with the facts proved, from which it clearly appears that the missing box belonging to *Mrs. Morrison* was by the expressman she employed placed on the very wharf on which defendant, according to her statement, on being requested to take charge of and convey her goods in his vessel to Economy, directed it to be placed; and, being placed there, it was in my view a constructive delivery (*Story on Bailments* [8th ed.] page 488) to the defendant, which imposed on him the duties of looking after and taking it on board, and made him legally responsible for its loss. There is one feature in this case which has made an impression on my mind; it is this, that defendant, when under examination, did not venture to contradict the important evidence of *Mrs. Morrison* as to the conversation which she

had with him on board the vessel in presence of *John Marks*, when on her enquiry she was informed that her trunk and box were stowed away in the hold of the vessel, on the faith of which she paid the defendant the freight. It is true her statement in this respect is contradicted by *Marks*, but all that the defendant himself said upon that subject was that *Mrs. Morrison* did not say that the things had been sent, and that he did not recollect any reference being made to *Marks*, an explanation which possibly struck the minds of the jury, as it did my own, as significant and very unsatisfactory. I think the verdict must stand and that the rule for setting it aside must be discharged with costs.

WALLACE v. BOSSOM.

Plaintiff recovered judgment against defendant after plea *puis darrin continuance* of composition and discharge under the Insolvent Act of 1869, the suit having been commenced before the assignment of defendant under the Act. The discharge was confirmed after plea and before trial, but does not appear to have been brought to the notice of the Court in any way at the trial. On motion to set aside execution on the judgment,

Held, that the defendant must have the advantage of the general provisions of the law in his favour, which cancelled the original indebtedness, and that the execution and proceedings thereunder must be set aside.

This was an application to make absolute a rule *nisi* to set aside an execution remitted by His Lordship the Chief Justice to the full Court.

Defendant was indebted to plaintiff, and afterwards became insolvent. Action was brought before the insolvency, but judgment was not obtained until afterwards. The plaintiff had not put in any claim or obtained any dividend.

The action was brought May 10, 1873, and pleas filed on May 23, 1873. On June 9th, 1873, the defendant made an assignment under the Insolvent Act, and on August 6th, 1873, obtained a deed of discharge from his creditors, which was confirmed on the 19th November, 1873. After the deed of discharge and before the confirmation, the defendants, in October, 1873, filed an additional plea setting up the discharge.

The trial did not take place until January, and judgment was entered up on the 30th January, 1874, after which the execution was issued.

Eaton, in support of the rule, applies under R. S. Ch. 96, Sec. 15, for leave to read a fresh affidavit, setting out that on the trial the defendant's attorney tried to introduce the further plea of discharge and it was not allowed. (The COURT refuse to allow the affidavit to be read.)

There is nothing shown in Wallace's affidavit to prove neglect on the part of the defendant in pleading his defence. He pleads the discharge at the earliest moment. The plaintiff was not ignorant of the fact of insolvency, as he was present at the first meeting of creditors, as he himself admits. Cites *Insolvent Act of 1869, Secs. 94, 98*; *L. R., 2 Exch.*, 208; *L. R., 3 Q. B.*, 627; *Ch. Arch.*, 1262. In those cases neglect was shown. In this case no neglect was shown in pleading. The *onus* lay upon the plaintiff to show neglect on our part and that we had the opportunity. Cites *19 C. B., N. S.*, 85.

Wallace, contra.—Even if an application was made on the trial to plead the added plea, that was too late. The judge would be perfectly justified in refusing to grant the plea after the delay from the 19th November until the trial in January. There was neglect here from the 19th of November, when the discharge was confirmed, until the trial in January. The defendant has not brought himself within the law. He does not show that the deed was signed by the proper number of creditors representing the required values. The value is not stated. It must be shown that the plaintiff's name was on the schedule of creditors. It is not so shown here. R. S. Ch. 94, Sec. 157, enacts that a plea pleaded since the last continuance cannot be pleaded without confessing the action up to that time. The defendants did not offer to abandon their former pleas, they should have asked for leave to abandon their previous pleas and set up the new defence. The original pleas were put in simply to get time to make an assignment. A defence of this character must be pleaded and put on the record. It cannot come in, as it is attempted here, by affidavit. *L. R., 5 Q. B.*, 230; *Bump's Bankrupt Law*, 641, 642. The court will

not even open a default to let in the plea of discharge. *Bigelow on Estoppel*, 615; 8 B. & S., 748; L. R., 3 C. P., 458; *Ib.* 18.

King, in reply.—The objection as to neglect has no force. We do not hold that the plea of discharge without leave of Judge is available except as a notice to plaintiff. He went further and obtained a confirmation, which we desired to have on the record. It is rarely that you can apply to a Judge between the 19th November and the 6th of January. The trial was at Chambers.

It is objected that the affidavit of the defendant does not set out in terms that the deed is executed by the requisite number representing the required value. The Statute makes the confirmation, which is annexed here to the affidavit, proof of the discharge. Insolvent Act of 1869, Sec. 104.

The Judge held on the trial that he was simply assessing the amount for which the plaintiff was entitled to rank on the estate, and that was the right view of the case. That was the reason why he rejected our application for leave to plead the discharge.

The English Insolvent Act, under which the cases cited contra have been decided, is different from ours. Our act explains itself; the English Act does not. Our section 98 explains section 94. The English Act of 1861, chap. 134, sec. 192, under which the decision in 3 Q. B. proceeds, provides that the deed of composition shall be binding if certain conditions set out in the act be complied with. There is no provision as to confirmation similar to ours. (YOUNG, C. J.—There is a certificate.) Section 198 provides for a certificate. (YOUNG, C. J.—The whole question is whether, there being no plea, you can get the benefit of a discharge by a motion. Is the plea necessary?) It is not necessary, and if necessary negligence should have been shown on our part. The English Act, Sec. 161, requires the discharge to be pleaded, and the case in 3 L. R., is upon that act. The American Act also provides for the discharge being pleaded. Our Act does not require the discharge to be pleaded, and makes it absolute. In *Murray v. Ross*, 2 R. & C. 154 the plea was not a plea of confirmation, but merely an assign-

ment, and then the Court was divided. A copy of the confirmation is sufficient under section 134, *Wotherspoon's Ins. Act*, p. 118.

The plaintiff's judgment is merely an assessment of the amount for which plaintiff was to rank. I do not contend that the Court can review the judgment of the Judge who tried the cause, but merely that his judgment is to be considered as an assessment, the fact of the confirmation of discharge having been brought to his notice.

WILKINS, J., now (March 26th, 1877,) delivered the judgment of the Court :—

The plaintiff sued defendant in a summary way.—After suit commenced, and before judgment, on 9th June, 1873, defendant assigned his property under the Insolvent Act of 1869. On 6th August, 1873, he became a party to a deed of composition from his creditors of a character required by the Act. On or about 17th October, 1873 (after having pleaded in denial of the indebtedness), he pleaded a plea *puis darrein continuance*, to the effect that since action commenced he duly assigned under the Act, and that by deed of composition and discharge duly executed by his creditors he had been discharged from all liability in respect of the plaintiff's claim. On the 19th of Nov., 1873, the Insolvent Court confirmed the deed of composition and defendant's discharge. It does not appear that that act of the Court was brought to the notice of this Court, at the trial of this cause, which took place under the plea *p. d. continuance* above noticed. I cannot believe that it was, because, under the circumstances, not explained and which I find it difficult to understand, judgment was given for the plaintiff against the defendant. On the 30th of May, 1876, an execution under the judgment was issued, and delivered to the Sheriff to be executed. On the 20th June, 1876, the rule *nisi* to set aside the execution and proceedings under it was obtained. After hearing an argument, I am of opinion that it must be made absolute with costs. Sections 94, 98, and 100 of the Insolvent Act of 1869, read in connection with section 101, necessitate such a judgment.

The deed of composition (see sec. 101) was not made abso-

ute in its effect on this indebtedness until *after* the plea *puis larrein continuance*, the only one, after withdrawal in effect of the former pleas, had been pleaded. Therefore, notwithstanding this judgment in a summary suit, the defendant must have the benefit of the general provisions of law in his favour, which cancelled the original indebtedness. When he pleaded the only plea that he could then have pleaded under the statute, he was not in a position to plead *confirmation of the deed and his discharge under it*.

WHITEHEAD v. HOWARD.

Plaintiff and defendant entered into a co-partnership for five years, under a written agreement, containing a provision that, "it shall be lawful for the said E. H. (the defendant) to terminate the same at the end of the first year without any notice, if the business shall not prove satisfactory to him." Defendant terminated the co-partnership at the end of the year on the ground of the business not having proved satisfactory to him, whereupon plaintiff brought his action for nonfulfilment of the agreement, alleging that the business had proved satisfactory. The jury found for plaintiff with large damages, and found, in answer to a question put, that the defendant, when he terminated the co-partnership, was not dissatisfied with the business.

Held, that the agreement gave an uncontrolled discretion to defendant, and that the verdict must be set aside.

WILKINS, J., dissenting.

This cause was tried before Mr. Justice SMITH at Halifax, and a verdict found for plaintiff for \$1500. A rule *nisi* was granted to set aside the verdict on the ground that it was against law and evidence, and for misdirection by the learned Judge who tried the cause. The cause was argued in February, 1877, before WILKINS, McDONALD, SMITH and JAMES, JJ.

Ritchie, Q. C., in support of rule.—There are two counts. The first sets out the partnership and charges breaches of the agreement, e. g., that the business was not done at the establishment and that the plaintiff was excluded from the premises. The second count is for the termination of the partnership. The first two pleas deny the deed and the trespass; the third alleges that business was carried on at the place and that the

defendant did not close and shut up or eject plaintiff, &c.; the fourth, that the business did not prove satisfactory; and the fifth, that plaintiff, being cutter, and taken as such, was incompetent on account of dissipated habits.

The case turns on the question whether Howard had a right to terminate the partnership as he did, because the removal of the books was afterwards. The Court has already decided that the defendant had a right to put an end to the partnership. In answer to questions put on previous trial, the jury found that the business had proved satisfactory to Howard, the defendant, and that it ought to have so proved satisfactory.

The evidence on the previous trial was exactly the same as this. *Munly v. Gresham Life Ass. Co.*, 29 Beav. 439.

The interpretation of the agreement is that Howard was to be judge and end the partnership in his discretion.

2 *McN. & G.*, 216; 6 *Q. B.*, 682; *L. R.*, 18 *Eq. Cases*, 28.

Weatherbe, contra.—The case in *Beavan* does not apply here. The directors *bona fide* exercise their discretion. There is a large number of cases where it is held that if a tribunal agreed upon by the parties *bona fide* exercises its discretion, it is the same as an arbitration. Here the right to dissolve depends upon the question whether the business proved satisfactory or not, and that is a pure question of fact. If the jury had found that the business was unsatisfactory, and had been terminated on that ground, that would have been conclusive against us. The defendant admitted that he had intended to put out the plaintiff two months after he started, before he looked into the books. The defendant in his letter gave his reason for the dissolution, and it had nothing to do with dissatisfaction with the business. He was satisfied with the business. 4 *Bing. N. C.*, 105; 4 *C. B.*, 909; 1 *B. & S.* 799.

The whole agreement is to be read together. It shows that the termination is not to be upon a caprice of the defendant. He must really be dissatisfied with the business as a matter of trade. The clause previous to that relied on provides for a notice of three months where the termination is to be on the mere motion of the defendant. What protection would that notice be to plaintiff, if the defendant could terminate on mere caprice without proving the fact of dissa-

tisfaction with the financial results of the business ; and, if the power in question is arbitrary, what need of the previous section providing for notice ?

Addison on Contracts, 666.

The jury have in effect found that Whitehead got no notice.

His exclusion in the letter is put on the ground that the defendant had himself leased the premises, and that he would exclude him on account of his insulting language.

The case might be such that the defendant was actually dissatisfied, but yet ought reasonably to have been satisfied, in which case the plaintiff should succeed, but I am willing to leave it on the ground that he was not actually dissatisfied at all, but put forward a mere pretence of that, while he was perfectly satisfied with the results of the business.

Cites *Waterhouse v. Morrow*, (from a newspaper report of a decision by this Court.)

McDonald, Q. C., in reply.—The dissolution by notice is not provided for except after the end of the first year, but in contradistinction to that it provides that at the end of the first year the defendant can terminate it if it *proves not satisfactory*. Now what is meant by the *business not proving satisfactory* ? Suppose the plaintiff was a drunkard, or was offensive to customers, or that his course was injuring the business. Suppose his moral conduct was disreputable and the defendant was dissatisfied.

(WILKINS, J.—You would construe it as if the word *partnership* were there.) Exactly. Now who is to be the judge under the agreement ? The cases cited where the jury were permitted to pass upon that question do not apply to this case.

Suppose Howard had conceived a groundless prejudice against the plaintiff, could he not at the end of the year say, the business is unsatisfactory to me ? The word “ business ” includes all that is connected with it. Irrespective entirely of the legal principle invoked, they meant that Howard should have the opportunity of breaking the partnership.

Either the jury had the power to say that he ought not to be satisfied, or else the Judge was not right in directing the jury that the defendant was to be the judge in the matter.

The case in 4 C. B., 899, does not apply. The Court simply held that, having bought an engine which did not come up to warranty, the defendant could not offset the deficiency in value, but must bring his action on the warranty.

(McDONALD, J. In all the cases cited the question was as to something done for which money was due at the time. If this was a question as to the right of the defendant to exclude the plaintiff from proceeds of the business on the ground that it was unsatisfactory, it would stand in a different position.)

There is no contradiction as to the facts bearing on the point in dispute in the evidence.

So far as Whitehead was concerned the success of the business was nothing to him, as he was paid weekly wages as a cutter. He had no risk or liability, so that, as far as equities are concerned, it is all on one side. Cites 3 B. & S., 364.

McDONALD, J., now (March 26th, 1877), delivered the judgment of the Court :—

The plaintiff and defendant were co-partners as clothiers under an agreement dated the 1st day of May, 1871, by which it was stipulated that the co-partnership should continue for five years from that date, subject to be sooner determined at any time after the expiration of the first year, by either party giving notice in writing for that purpose, to the other. The agreement further provides that "it shall be lawful for the said Ebenezer Howard to terminate the same at the end of the first year without any notice if the business shall not prove satisfactory to him." On the evening before the expiration of the year, the defendant notified the plaintiff of his intention to terminate the partnership at the end of the first year, the business not having proved satisfactory to him; and on the following day he addressed a note to the plaintiff informing him that the books belonging to the firm were then in the possession of Mr. Jas. W. Creighton for the purpose of completing the balance sheet, and that Mr. Creighton would give him free access to the same, together with any information that he might need.

The note concluded in these words "I have also to inform you that, after your grossly insulting language to me to-day,

shall not allow your presence on the premises, 185
 his Street, which I have leased from S. Howard &
 " This action was brought to recover damages for the
 fulfilment of the agreement, and it is alleged in the de-
 cision that the business did prove satisfactory to the
 defendant at the end of the first year.

The jury found a verdict in favour of the plaintiff for
 £1000 damages, and to the question; " Was the defendant,
 indeed, when he terminated the co-partnership on the 30th
 of April, 1872, dissatisfied with the business of the co-
 partnership?" they answered, "He was not." A rule *nisi* was
 granted to set the verdict aside on the ground that it was
 against law and evidence, and for misdirection. The latter
 ground however, was not urged at the argument and is not
 supported by law.

The main question turns upon the construction of that part
 of the agreement under which the defendant claimed a right
 to put an end to the co-partnership without notice if the busi-
 ness should not prove satisfactory to him. The plaintiff con-
 tends that the dissatisfaction which, in law, would enable the
 defendant to take the course he did, must be shown to have
 been justified by the facts, and urges that, in this case, there
 was no cause for such dissatisfaction. Several cases were
 cited in support of that view, but I do not think that they are
 decisive. Here there is no question respecting compensation
 for anything done by the plaintiff under the agreement, nor any
 question respecting his right to such profits or advantages as
 have accrued to him under it, up to the end of the year.
 The complaint is that he was not permitted to act further as
 partner and to acquire future profits under the agreement.
See v. The Gresham Life Assurance Society, 29 Beavan,
 shows that the *bona fide* exercise of discretion, under an
 agreement, somewhat similar to this, though the facts were
 as ought to have led to a different result, cannot be in-
 terfered with by the court; and *Inderwick v. Snell*, 2 McN. &
 116, is a very strong case in favour of the defendant,
 holding that even the expression " reasonable cause," when
 used in a deed giving discretion, for such reasonable cause, to
 remove a director, did not refer to such a cause as, in a court

of justice, would be held reasonable, but only to such a ~~ca~~^{use} as should be held reasonable by the parties exercising the ~~d~~^{is}cretion.

In the case before us the agreement does not at all require that the cause of the dissatisfaction which would justify the defendant in putting an end to the partnership should in fact be reasonable. In *Stadhard v. Lee*, 3 B. & S., 364, the law was clearly laid down by COCKBURN, C. J., who, after acceding to the judgment in *Dallman v. King*, 4 Bing. N. C., 105, said: "But we are equally clear that where, from the whole tenor of the agreement, it appears that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon and the other to submit to it, a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties." He again says: "It is the duty of the Court to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable; yet if the terms are clear and unambiguous, the Court is bound to give effect to them, without stopping to consider how far they may be reasonable or not." There is no ambiguity in the language of the agreement before us. It is as clear as possible, giving the defendant the right to end the co-partnership, if, at the end of the year, the business did not prove satisfactory to him, and it does not require that there should be any cause shown, either reasonable or unreasonable, for such dissatisfaction.

It is true that the jury found that the defendant was not dissatisfied with the business, but that finding is entirely against the evidence, and cannot affect the law which controls the case. The cause was argued, by the learned counsel for the plaintiff, as if the financial result of a business was the business itself, and as if every consideration but that of the profits were to be ignored in adjudging whether the business was or was not satisfactory: but it cannot be said that, because the profits of a co-partnership business may be such as to appear satisfactory to some persons, the business itself must

necessarily be satisfactory to all those engaged in it. No matter what the profits may have been, there are numerous causes which may have rendered the business extremely unsatisfactory to some of the parties engaged in it. One may have to use unexpected, extraordinary, and constant vigilance in consequence of the carelessness or misconduct of his co-partner, and day after day he may have to suffer a variety of annoyances and even insults, at the hands of his associate, in which case it cannot be said that the business would necessarily be satisfactory to him, whatever the profits might be. It cannot be contended that what would be satisfactory to one would necessarily be satisfactory to another. One may be satisfied if the business pays twenty-five per cent. on the capital invested, while another may not be satisfied if it pays fifty.

It is impossible for any one but the defendant himself to say what was or was not satisfactory to him. By the agreement he was constituted the sole judge of that question, and the jury who undertook to say that he was not dissatisfied with the result, in the face of his oath, assumed that they knew his thoughts better than he did himself. Besides, it is difficult to conceive why the defendant should have put an end to the business if it had proved satisfactory to him.

Entertaining the views that I do as to the true construction of the agreement, it is not necessary to refer to the evidence further than to say that it seems to me to disclose good reasons to create dissatisfaction in the mind of the defendant, even if, contrary to my opinion, such evidence were necessary to justify the defendant in the course which he took. I think, therefore, that the verdict must be set aside.

WILKINS, J., read the following dissentient opinion :—

It appears to me impossible upon principle to disturb this verdict.—The case involves a necessity for judicial construction of the agreement in question, and I regret to say that I am unable to concur in the view of its meaning expressed by my learned brother at the trial, although I quite agree with his exposition of the principles that concern the construction of a written agreement. The words of the condition, on the existence of which the defendant's right to dismiss the plain-

tiff, as he did, depended, are these: "*if the business should not prove satisfactory to him.* Observe primarily the words are not "*if the connection should not be satisfactory to him.*"—If the two words which I have italicized or words of the same import were there, I should have construed the agreement *in loco* as my learned brother did. But such words are not there, and, not being there, we must construe the two words that are there, "business" and "prove" respectively, according to their plain and natural meanings. Worcester shews, and no lexicographer will shew otherwise, that the first word means "calling, employment, occupation, trade, commerce, traffic, something to be transacted, concern, matter, affair."—The word cannot be defined otherwise than by some of these definitions—"Prove" is not the equivalent of "Be." The former, used as a neuter verb, means "to make trial, or experiment," "to be found by experience to be;" "to be found in the event;" "to turn out."—These are the words which the parties have used, and we must construe them as my learned brother told the jury, according to their plain and natural meanings. But so to construe them, to make them give *Howard* a right to dismiss the plaintiff, on account of moral misconduct, or offensive personal habits, or even want of skill, or from mere pleasure or caprice operating on the mind of *Howard*, so as to enable the latter, at the end of the year, to say to defendant: "It is my pleasure that the connection between us shall now terminate," would be *not to construe the words according to their plain natural meaning.* If this be sound reasoning, and I apprehend it is such, then the matter stands thus:—The construction was purely for the Judge. The question *actually raised by the pleadings*, viz:—"Did the state of the *business prove a matter of real dissatisfaction to the defendant's mind,*" was for the jury. One, substantially the same with it, was put, and answered decisively for the plaintiff. Unless the defendant's evidence shewed that the *business did prove* (i. e., as the pure result of honest investigation, appear to the defendant to be) "*a matter of real dissatisfaction*" to him,—the verdict must stand. He utterly failed to shew *that* to the jury. He has failed to shew it to my mind.

Therefore I feel bound to say, that the rule should be discharged.

THE QUEEN v. FRASER.

The goods of the Sovereign cannot be detained under a claim of lien.

A defendant cannot plead double or several matters in the case of the Crown.

The Queen can bring replevin under R. S. ch. 94, sec. 329.

Demurrer to three pleas in an action of replevin to recover railroad iron belonging to government, held by a wharfowner at Pictou. The defendant pleaded lien in the master of a vessel for freight, and a lien in defendant for wharfage and storage of the goods.

Graham, in support of demurrer.—The King is privileged from arrest and his goods from detention for claims against them for the same reason. No action can be brought against the King, and from that it follows that the subject can have no redress by his own action, which would be going much further than action at law.

It is contrary to precedent. There is no case where the King's property was detained for a lien.

In England they have sought to hold H. M. vessels for salvage, but the Court could not have jurisdiction, even where the ship is a foreign ship. 2 *Dodson*, 464; *Id.*, 37.

A packet ship was sought to be detained for repairs; she was carrying mails. The Court refused to go on with it; but the Post Office authorities afterwards assented and the case went on. 2 *Dodson*, 103.

In the United States it has been decided that the property of the State could not be detained for the price of carrying the mails. *Redfield*, 389; 4 *Howard*, 20.

In *Maryland* a person sought to detain horses engaged in carrying the mails for feed. He could not do it.

The seventh plea is bad because pleaded with other pleas inconsistent. Under Common Law only one matter could be pleaded. The statute of Anne first gave the right to plead several matters, and that was held not to apply to the *King*. Where the King is not mentioned he is not bound. *Manning's Exch. Pr.* 105, 141, 199.

The Crown and a subject cannot hold in common. Where goods are given to the Crown and a subject, the whole goes to the Crown. Therefore the subject cannot have a lien on goods of the crown ; 2 *Dodson* 103.

If the plea had shown that these goods were owned by Michael White, it might be good. I do not see how Fraser can detain these goods, admitted to belong to Her Majesty, for any claim against White.

When a person who has no title at all to goods gives them to any carrier to carry, he cannot detain them for the lien for carriage ; 2 *T. R.* 485 ; *Am. Cases*, 5 *Cush*, 157 ; 8 *Gray*, 262.

The plea setting up lien must allege indebtedness.

There is no indebtedness alleged in this plea.

6 C. & P. 675. *Redfield on carriers*, sec. 272.

Where a party detains for a lien, he has no lien for keeping the goods. 8 *H. of L. C.*, 345. The claim here is for warehouse room and wharfage in the attempt to preserve the lien of the master. He does not detain them as agent, but in his own right :

If he claims possession as against the master the master has no lien, for possession is necessary to lien ; *Addison on Torts* 422 ; *Redfield on Carriers*, 289 ; *Kent*, 6405 ; 5 *C. & P.*, 399.

McDonald, Q. C., contra.—In the absence of direct authority, the presumption is in favor of our lien. The remedy by petition of right is comparatively modern. Before that the Crown could be brought into Court on the usual action. The statute changed that.

The Crown here seeks to evade a common law liability to lien to which an ordinary subject would be liable.

The cases cited do not apply. For instance the doctrine that the mails cannot be detained rests upon necessity. Just as the case of the stoppage of munitions of war. But here

when the Crown actually becomes a trader and purchases material for railways, &c., the case is different. The necessity does not arise.

In the Post Office case in *Dodson*, the argument was put on the ground of *convenience*, and not on any right of the Crown to be exempt from the proceedings. If the principles contended for prevailed, hardly a ship enters the harbor that would not be exempt.

The case in *2 T. R.*, 485, is one where the goods were delivered to a person claiming them wrongfully.

As to the objection to the last plea, there is a clear right set forth. He alleges the lien. It is not necessary to say what the lien is for, beyond informing the plaintiff of the nature of the claim. He has stated in clear and distinct terms a sufficient contract to constitute a lien on the goods. He claims a lien as an agent of the master as well as on his own account. The first lien set up in the plea for freight is a good lien unquestionably. The mere fact that he has united a claim of his own with a claim that forms a valid lien does not invalidate the plea.

Where is the authority for bringing replevin by the Crown? In matter of realty the Queen cannot be disseized, and therefore cannot bring ejectment. Similarly she cannot bring replevin. In *R. S. cap. 94, sec. 329*, the Queen is not named, and therefore she acquires no rights under it. She must rely upon her constitutional modes of procedure. *3 Bl.*, 257-258. The statute provides for security to be given and therefore the Crown could not be contemplated.

If the statute of Anne as to double pleading does not bind the Crown, the Crown cannot come in and avail itself of our statute without being bound by the practice it prescribes.—The Queen availing herself of our statute must be subject to the practice as to amendment of double and uncertain pleadings.

Graham, in reply.—The Queen is not bound by statutes, but she may avail herself of them.

(THE COURT. But can she avail herself without being bound by the practice therein prescribed?)

The Crown can bring any action that the subject can ; she can bring detinue for instance.

In *Uniacke v. Dickson*, James, N. S. R., 287, Judge HILL admitted that none of the prerogative writs had issued, and, as far as I can learn, since that no *sci. fa.* has been issued, and all actions are brought by her, as by a subject.

In a Canada case, although the statute provided that suits on the Post Office bonds should be brought by the Post Master, yet the Court held where a *sci. fa.* was brought by the Crown, that it was rightly brought, as the Crown was not bound by the statute.

Trover perhaps cannot be brought by the Crown, but that is because of a fiction that the goods of the Crown cannot be converted. But actions can be brought, and replevin here is of the nature of an action of detinue.

Assuming that the plea of lien is good he can only hold it as agent of White. But here he holds adversely to White. (*McDonald, Q. C.*—Suppose we strike that out, is not the rest of the plea good ?) No. There is no valid plea of a lien. He merely says he holds them for a claim, which is not sufficient.

Possession is necessary to a lien. Now who has possession ? If the defendant, then White cannot have and has no lien. He has lost it and could not transfer the goods subject to the lien. If he is holding them as the agent of White, he can have no lien against him. He sets up inconsistent liens.

There is no privity of contract between the Crown and this third party.

SMITH, J., now (March 26th, 1877), delivered the judgment of the Court :—

This is an action of Replevin brought in the name of Her Majesty the Queen against James Fraser of Pictou, who, as is alleged, unjustly detained a quantity of steel rails and fish plates for railway purposes, the property of Her Majesty.

To this action the defendant has pleaded seven pleas; to the fifth, sixth and seventh of which the plaintiff has, by the Attorney General of the Dominion, demurred.

The fifth plea alleges that at the time of the alleged detention defendant had a lien upon the goods for money payable

to him by the plaintiff for warehousing the same, and that he detained them for a lien and security for said debt.

The sixth plea sets up a lien upon said goods on behalf of the owners of the schr. "St. Hubert" as common carriers, for freight on the carriage of the rails and plates from Dalhousie in New Brunswick to Pictou, as well as for the demurrage of said schooner; and that, so having a lien thereon, the owners of said vessel deposited the goods on the wharf and in the warehouse of defendant, to hold the same until such freight and demurrage were paid.

The seventh plea sets out a lien on said goods on behalf of the defendant for money payable to him from the masters and owners of the schr. "St. Hubert" for the wharfage and storage of the goods and taking charge of the same at the instance of said master and owners, who instructed him to hold them "subject to certain claims" which they had against the plaintiff.

The same ground of demurrer is taken to the said three pleas, viz: That "the goods of Her Majesty the Queen cannot be detained for a debt due in respect of them, and are not the subject of a lien, and cannot be taken in execution, and a debt due by Her Majesty cannot be enforced by detention of her goods or in any other way than by petition."

It is also alleged as ground of demurrer to said pleas that they are "pleaded with other pleas with which they are inconsistent, and a defendant cannot plead several pleas to the same matter or count in suits or proceedings brought by Her Majesty, she not being named in the statute allowing a defendant to plead several pleas."

In the view I take of these questions raised by the demurrers, it will be unnecessary for me to advert to the other grounds of objection taken to the seventh plea, except that which submits "that the debt alleged to have been due to the said defendant from the said master and owners for wharfage and storage of said goods does not create a lien upon the goods admitted to be the goods of a third person, the plaintiff."

Let us first enquire how far the position taken by the plaintiff, that the goods of the Crown cannot be the subject of lien

can be sustained, for, if it can be upheld, the pleas are unquestionably bad.

I have looked in vain, though with some care, into the few authorities upon the prerogative rights and privileges of the Sovereign within my reach, to discover a decision which establishes the right of a subject to detain and hold the property of the Queen by way of lien for a debt due by her to him. It is a well acknowledged principle, however, familiar to us all, that in the eye of the constitution and the law, the prerogative works no wrong. The Sovereign is described as "the *fountain of Justice* and administrator of the laws, and all "judicial power is supposed to be derived from the Crown." It is indisputable that the Sovereign cannot be sued or made subject to the usual Common Law proceedings which may be instituted between subject and subject ; for, as *Chitty* says in his work on Prerogative,—“ All judicial proceedings and writs “ must be in the King’s name, as the fountain of justice ; and “ it would be absurd that the King should command and “ require another to command himself ; independently of its “ being contrary to the constitutional idea of the king to imagine that he is subject to the control and command of any of “ his subjects.” And again the same author says, at p. 340 ; “ The law has furnished the subject with a decent and respectful mode of removing the invasion ” (i. e. of the rights of property) “ by informing the King of the state of the “ matter in dispute ; and it presumes that to know of “ any injury and to redress it are inseparable in the royal “ breast ;” and at page 344 I find it stated ; “ A petition of “ right ” (which I may remark has been given by recent Dominion Legislation) seems also to be the *only remedy* “ where the King does not pay a debt, or an annuity, or wages, “ &c., due from him, or in the case of unliquidated damages “ occasioned by any breach of contract with the King himself.” If therefore the subject has no other remedy for the *recovery* of a debt due from the Crown than by petition, upon what principle can a party withhold and detain the goods of the Queen on a claim of lien, which is simply a common Law right as between subject and subject, to *secure and compel payment* of a debt ?

When treating of the question of a carrier's right of lien, *Parsons* in his work on Contracts, sec. 289, says:—"Common Carriers acquire no such lien upon goods transported for the National Government as to justify their detention." Indeed in my opinion it would be most unreasonable and highly impolitic, in view of national and public interests, were it otherwise. Numerous cases may easily be conceived where grave consequences and serious complications might arise were a different doctrine to prevail. The very object and purpose of a lien, viz: to afford security for the liquidation of a debt created in connection with the article detained is, as it seems to me, in the case of the Crown entirely absent, on the principles to which I have adverted in reference to its prerogative attributes. I am of opinion that no such lien can be upheld.

With regard to the ground of demurrer taken—that the pleas are pleaded with other pleas with which they are inconsistent, which I have already noticed, I have no doubt that it is incompetent for a defendant so to plead in a suit brought by the Crown. *Chitty on Prerogative*, p. 367, thus recognizes this principle of pleading:—"In no case can a defendant plead double or several matters in the case of the Crown under the *4 & 5 Ann.*" No such right thus to plead is conferred either by the Imperial or Provincial Statutes, as against the Crown, and nothing but express words would do so; *Atty. Genl. v. Allgood*, *Parker's Rep.*, 1. A question may arise, however, under our Statutes whether this objection should be taken by demurrer. It is unnecessary to decide this in consequence of the view I entertain on the subject of the right of lien.

The right set up by the defendant in his seventh plea to detain the goods for a debt due from the master and owners of the schooner for the wharfage and warehousing of said goods I apprehend to be entirely unsustainable. The goods are admitted by the pleas to be the property of the plaintiff.—Suppose the master and owners had the lien contended for, the only sum they could compel the plaintiff to pay would be the amount due for freight, even though the goods had remained in defendant's warehouse for a year. In *8 H. of L. C.* 338, it was decided that a person who has a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add to the amount

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for which the lien exists, a charge for keeping the chattel till the debt is paid ; and in 6 C. & P., 674, it was held that a person had no right to keep the property of another, and charge for the standing of it, unless there had been a previous bargain between him and the owner, or between him and some agent authorized by the owner. There was no right existing in the owners and master to charge for such warehousing, and there was no privity between plaintiff and defendant, and no authority shewn emanating from plaintiff to the defendant so to receive and keep them on his wharf and warehouse them. I can conceive of no claim he could have to detain the plaintiff's goods on the ground of lien. His remedy is a personal one against the captain and owners.

It was contended by *Mr. McDonald* at the argument, that the Crown could not bring Replevin, as it was an action resting on and derived from our Provincial Statute. I think it is competent for the Crown to avail itself of the statute. *Chitty on Prerog.*, p. 382, lays down the well known principle thus : " The general rule clearly is, that though the King may avail himself of the provisions of any Act of Parliament, he is not bound by such as do not particularly and expressly mention him."

For the reasons I have given, I am of opinion that the demurrers must prevail and judgment be for the Crown.

CHURCHWARDENS OF FALMOUTH v. VAUGHAN.

Plaintiffs claiming a certain lot of land under a grant from the Crown, passed during the last century, brought an action of trespass against defendants for cutting timber on the land. At the trial plaintiffs produced their original grant, and tendered as evidence to identify the locus with their lot, ancient copies of the allotment book and plan of the township in which the lands lay, which had often been received in evidence in other suits, the originals having been lost. These copies were received by the Judge who tried the cause (*McCULLY, J.*) without proof of a search for the originals.

Held, that they had been improperly received in evidence.

The Judge directed the jury that plaintiffs had proved a documentary title.

Held, that, under the above circumstances, there had been a mis-direction on that point.

Defendants pleaded 1st, "that the land is not the land of the plaintiffs," and 2nd, "that he land is the land of the defendant." Plaintiffs gave no proof of possession of the land in question.

Held, that under the pleadings, there being no plea expressly denying plaintiffs' possession, the plaintiffs were relieved of the burthen of proving possession.

Defendant gave evidence that he had chopped on the *locus* ever since about 1836, at first as a trespasser, built a logging camp on it about two years later, which he occupied in winter, had one side line run out by a surveyor in 1841, built a saw mill in 1850, which, with the adjoining yard, continued to be used for upwards of twenty years, had three lines run out by a surveyor in 1852, one of these lines being that run out in 1841. Evidence was also given of three parties having gone upon and cultivated portions of the land under defendant, within twenty years, but two of their clearings had been abandoned before action.

Held, that, in the absence of any documentary title, defendant had not proved possession to give him title under the Statute of limitations to any portion of the land except the mill site and mill yard, and that, as the alleged trespasses were committed on other portions of the land, and the misdirection, &c., were not upon material points, the verdict for plaintiffs must stand.

This was an action of trespass, for cutting on and occupying lands claimed by plaintiffs through grants from the Crown. Defence, possession for more than twenty years. The cause was tried before Mr. Justice McCULLY, at Windsor, in 1876, and a verdict found for plaintiffs. A rule *nisi* to set the verdict aside was granted by the learned Judge and argued February 10th, 1877, before SIR W. YOUNG, C. J., WILKINS, McDONALD, and JAMES, J. J.

Weeks, Q. C., in support of rule.—The first point we take is that evidence was improperly admitted. The allotment book of lands in the Township of Falmouth should not have been received without the production of the return to the writ of partition. A paper purporting to be a copy of the original plan of partition has also been admitted without sufficient evidence of search. Cites *Songster v. Payzant*, Thomson, 408. It is within the knowledge of one of your Lordships, Mr. Justice WILKINS, in another suit, that the original writ of partition is in existence. (WILKINS, J. We cannot take judicial cognizance of that.) If your Lordships can take as you are asked to do, judicial notice of plans in evidence in another suit, you should take judicial notice of this fact.

We have clear evidence of possession. These defendants have cut over all these lands up to the lines.

(YOUNG, C. J.—It has been held that without a paper title *possessio pedis* is the limit.)

Here we have a general verdict for plaintiff, covering the mill erected by defendants, surely it cannot stand on that ground. The parties built a road through this land.

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The plea denies title in plaintiffs, and there is no proof of possession in plaintiffs. The plaintiffs, after lying idly by for a hundred years, ever since the grant in 1761, come here to bring this action, without producing a writ of partition, which is the very foundation upon which the title to each foot of these lands rests.

The learned Judge misdirected the jury in telling them that the admission of the allotment book and copy of plan perfected plaintiffs' title.

McDonald, Q. C., contra.—Cites *Thomson, N.S.R.*, 291. The only question is whether on the evidence there is adverse possession proven to sustain the plea that the land is the defendant's. There is not a pretence that defendant was in possession at the time of action brought, but he and his pretended tenants left two years before. I admit that on the trial the technical objection as to the plan might have been removed and ought to have been. *6 Exch.*, 119. (WILKINS, J., refers to the difference between English pleading and ours; the general issue and all general pleas being here abolished.)

Ever since the decision of *Grotto v. Farish* the doctrine has never been impugned (i. e. as to *Pleadings*.)

Assuming the technical difficulty as to the plan to prevail, there is evidence to justify the verdict.

The only paper said to be a copy is the plan. There is no contradiction of the statement that the allotment book is the original itself. The Court and jury are bound to assume that that is the original, from the evidence of the Town Clerk, who says the book is the original. It is sworn to as the original, as far as he is concerned, and that the lands of Falmouth were held under it. They are bound to prove the contrary. Here is evidence without the plan to justify the verdict, and the reception of the plan therefore is not a ground for setting it aside. Here we have the grant and the original allotment book. We do not want the plan, except to identify lot number 38, which was allotted to the plaintiffs, and the pleadings admit that the plaintiffs were in possession of the lot. The plan is not a part of any of the documents. The defendant himself identifies it. We can only be defeated

by such conclusive evidence of adverse possession as would give the defendant title.

The building of the mill and cutting of the logs is the only possession shown beyond ten or twelve years ago. The only acts, that can be construed even into acts of trespass are within ten or twelve years, with the exception of those mentioned. To establish the defendant in lot 38, you establish him in the surrounding lots, for he did not pretend to hold by the lines of lot 38; (Counsel here deals with the evidence of possession, shewing that the acts were not done with any claim of title or with intent to take possession of the lot or make it his own.)

The plaintiff's possession at the time of the trial is admitted and defendant had abandoned possession.

Thompson, in reply.—As regards the admission of the papers the point has been almost given up, except that the allotment book is the original. The contrary of that is proven. The witness says that, for all he knows, the allotment book may be a copy of a copy. It is distinctly proven to be a copy and was so treated in *Songster v. Payzant*, (as a matter of fact.) The ground taken by *Mr. Ritchie* was that there should have been a search for the writ of partition and return. As far as this book has any effect at all, it only purports to be a copy. A mere division of lands by a surveyor is no allotment. It is a copy of the return to the partition. The very point decided in *Songster v. Payzant* was that a search, in Halifax, for the return to the writ of partition was necessary. An allotment book is no evidence of title at all.

Statutes of Nova Scotia, Vol. 1, 131. All the steps set out in the Statute must be proved or else the record produced.

There is no title given here by the *grant* to the Churchwardens. It simply gives the *Minister* a lot of land which the allotment book defines as lot 38. Who gives it to the Churchwardens? It is not set off to the Churchwardens. It is set off as glebe land. (*McDonald, Q. C.*—Then it is in the corporation under the Statute as to glebe land.)

As to the want of plea, of *not possessed*, we have put them to the proof of their right and they must prove either title or possession.

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(YOUNG, C. J.—The possession of the plaintiff cannot be disputed if there is no plea.)

The plaintiff cannot recover in trespass, in England, if he merely proves title. He must prove possession as well. Here he can recover on proof of title without proof of possession under *Grotto v. Farish*. (YOUNG, C. J.—Unless defendant disputes it, possession is presumed to be admitted.)

Mr. Justice BLISS held in *Grotto v. Farish*, that the want of the plea only obviates necessity of plaintiff proving possession after proving title. The plea that the close is not the close of the plaintiff, puts the plaintiff to the proof of possession; 6 *Exch.*, 119. The case is applicable to this, as it was not decided under the general issue. The effect of our Statute and the decision in *Grotto v. Farish* (Thomson, 291,) is simply that the plaintiff is not put to the proof of his possession, but we have shown that the plaintiff was not in possession and that the defendant was.

JAMES, J., now (March 26th, 1876,) delivered the judgment of the Court :—

This is an action of trespass tried before the late Judge McCULLY, at Windsor, in the last September Term; verdict for plaintiff, \$500, which we are now asked to set aside, mainly on the grounds of improper reception of testimony and misdirection.

The trespasses are charged to have been committed on a lot of land consisting of 400 acres, known as lot number 38, letter D, of the original partition of the Township of Falmouth, under the Act of 1767. The parcel of land in question appears by the allotment book and plan of the Township which were given in evidence, to have been allotted to the church of England as a glebe lot, the two adjoining lots, Nos 37 and 38, being allotted, the one to the first minister, and the other as a school lot.

The Act of 1767, providing for the partition of lands granted *en bloc* to a large number of individuals, enacts that the allotment book and plan showing the results of the partition shall be returned to the Court, and their proper place of deposit is the office of the prothonotary.

The original grant of the Township of Falmouth was put in evidence, but it was given to a large number of proprietors as tenants in common of the whole tract of land granted. The papers given in evidence and received by the Judge as the allotment book and plan, by which the tract was devised, are ancient copies which have been retained in custody of the Township authorities, and are the only documents by which the proprietors of Falmouth have for some seventy years held their lands in severalty. They have often been received in evidence in this court, the originals having been lost or mislaid.

They have in this instance been received in evidence in order to identify the *locus* with the land allotted as the glebe lot under the writ of partition, but no evidence was given of a search at the proper office for the originals. Objection was taken at the trial to the reception of these copies, and the case of *Songster v. Payzant* cited from Thomson's Reports, 408, in which it was held after full argument that they could not be received except as secondary evidence after proof of search for the originals. The learned Judge charged the jury that the plan, allotment book, and grant gave plaintiffs a title, and that the evidence of defendant's possessory title was insufficient.—No evidence of a search, having been given in this case, we must hold in accordance with the previous decision referred to that the allotment book and plan ought not to have been received in evidence, and, as the plaintiffs without these have failed to identify the *locus*, they have failed in showing that constructive possession which is vested by law in the legal owner of lands.

As no evidence of actual possession was given by plaintiffs, except survey of the lot, our attention has been turned at the argument to the defendant's pleadings as rendering such proof unnecessary.

The two pleas on which the defendants rely are, *first*, that the land is not the land of the plaintiffs, and, *second*, that the land is the land of the defendant. Under the first of these pleas it is contended by plaintiffs' counsel that it does not amount to a denial of the plaintiffs' possession, which is therefore admitted.

Formerly the general issue of not guilty put in issue the plaintiff's possession, but this plea is now abolished (R. S. c. 94, ss. 144 & 152), and every pleading is required to *specify particularly and concisely* the facts intended to be denied.

This enactment has been the subject of a judicial decision in this court, (*Grotto v. Farish*, Thomson's R., 291); which was cited at the argument to shew that defendant's plea that the land was not the land of the plaintiffs did not amount to a denial of the plaintiffs' possession, which, being thus admitted, relieved the plaintiffs of the burthen of proving title and cast the burthen upon the defendant to shew title by possession.

BLISS, J., in giving the judgment of the Court in that case says: "The first plea only denies that a trespass has been committed; it does not deny that the possession of the land is in the plaintiff. The plea that the land is *is that of the defendant* does not deny that the possession is rightly in the plaintiff."

In this case the plea is different, being a simple denial that the lands were the lands of the plaintiffs, without any express assertion as in that case, that they were the lands of the defendant. Does it, if intended to deny the plaintiff's possession, meet the requirements of section 152? Ever since the passing of that enactment the practice has been general, when a plaintiff's possession is intended to be denied, to plead that "the plaintiff was not possessed of the lands as alleged." The defendants have seen fit in this case to depart from the simple form of pleading, and in so doing have failed to give the plaintiffs notice that they intended to dispute his possession.

The natural import of the words used is to deny the plaintiff's right to the land, and the Court are of opinion that the plea must be understood according to its natural import, which is a denial of right or title, and that it does not deny the plaintiff's possession, and therefore that the defendant must rely on his possessory title. The rule of pleading in England until recently was different. See *Slocombe v. Lyall*, 6 Exch., 119. But the difference results from the state of the law in England, where our statutory rules of pleading have not been adopted.

Before discussing the defendant's proof of title, I may remark that the evidence on the part of the defendants goes far to supply the defect of the plaintiff's proof as to the allotment book and plan, as it is clear that he and his surveyor saw them and identified by them this particular lot as No. 38, with the intention of appropriating it, and ran their lines from a copy of the plan produced at the trial. It is, however, unnecessary to consider this under the view which I take of the effect of the plea.

The substance of the defendants' evidence is that the defendant, *John Vaughan*, under whom the other defendant, his son, justified, commenced chopping as a trespasser on this lot about 1836; that about two years afterwards he built a logging camp upon it, which he occupied in winter, and that he has continued cutting timber on it and on other properties in the neighborhood until the present time. It is needless to observe that all these acts of trespass are utterly nugatory and valueless in attempting to shew title by possession; their effects on the contrary is to weaken a defendant's case, by showing conclusively the absence of all good faith on his part. The first act of the defendant indicating an intention to appropriate to himself this lot was in 1841, when he took advantage of the presence of a Surveyor who was engaged in running out a neighboring lot, and whom he had been assisting, to run one of the side lines of this lot between it and No. 31.

In 1850 the defendant, *John Vaughan*, built a saw mill on the property, which he continued to use for 22 or 23 years, the logs for which were cut on this property.

In 1852 he procured the running of the south, east, and west lines of the lot by a Surveyor named *Reddin*. In 1863 he gave a right of way through the property for a new public road and built a bridge on another part of the road at his own expense, as a consideration of the road being run through this property. About 1869 or 1870 one *Channer* went on a part of the land under *Vaughan*, and cleared four or five acres, on which he built a house and barn now occupied by him.

About 1864 one *Hart* went into possession of a part of the property and cleared an acre or two. He abandoned his pos-

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session and *James Besanson* occupied it for some years,—*Vaughan* says with his permission, but *Besanson* says he held it as his own and cleared six acres. After occupying it five or six years he deserted it and removed his house. Defendant's son looked after it for a year or two, when it appears to have been finally abandoned.

About 1863 one *Calvin Besanson* went into possession of part of the property under *Vaughan* and commenced clearing. After two years he built a house. He made two clearings, one of twelve or fifteen, the other of six or eight acres. After being there and cultivating part of the land six years he abandoned it, and a part of the clearing has since been let for pasturage by *Vaughan*.

The above is a substantially accurate digest of the defendant's evidence of possession. The occupation of the three tenants,—two of whom have abandoned their improvements,—does not appear to have been defined by any boundaries. They appear to have gone on the land by *Vaughan's* permission, or as trespassers on their own account, and cut and cleared where they liked.

The possession of the mill and mill-yard was undoubtedly such as would give title *pro tanto*, but that is no answer to this action, as the trespasses were committed on another part of the property. It remains to be seen under the authorities, whether the loose and undefined and to a large extent desultory possession of the tenants, coupled with the defendant's erection and use of the mill, and his continued system of logging over the premises, and partially defined by the survey of one line by *Armstrong*, in 1841, and the survey by *Reddin* of three lines (including that formerly run by *Armstrong*,) in 1852, are separately or together sufficient to give defendant, *John Vaughan*, title to the whole of the lot.

It is quite clear that the chopping and logging and the building of the log hut for lumbering purposes prior to 1841, cannot in the least avail the defendants. They were mere acts of trespass, not indicating a claim of right. It is also clear that the possession of the mill and yard for twenty-two or twenty-three years, taken by itself, would give title to no more than their own area, and that none of the other acts of

possession, such as clearing the land, &c., are sufficient, for want of adequate duration, to give title to any part of the lot. If these transactions can help the defendant in this action, it must be by connecting them with the two partial surveys in 1841 and 1852, as public claims of right, and grouping them together with the possession of the mill to show a continued occupation and user of the tract so surveyed. It must also be observed that the survey of 1841 of only one of the lines, without setting any corners or otherwise indicating the tract intended to be occupied, can have no legal significance in this suit. So that the sole question is, were the possession of the mill for over twenty years, and the possession of small undefined and separate portions of the land, in different parts of the lot, and at different times, so affected by the survey in 1852, as to constitute them the plenary possession required to give title to the whole lot? What is alleged about the road in 1863, is of no importance, as it may have been worth his while to build the bridge in order to get the use of the high road for lumbering purposes, as he was then, by his own evidence, actually engaged in plundering over the whole neighbourhood to get logs for his mill.

In considering the defendant's title, no cases having been cited in support of it, I shall give a *resumé* of the principal reported cases as to possession decided in this Province,—several having been decided which are not yet reported.

The leading case is *The Lessee of Cunard v. Irvine*, James' R., 31, in which it was held by the Court, mainly on the authority of American cases, that a party claiming wild lands under a deed, and having actual possession of a part, has a sufficient constructive possession of the whole land described in his deed, to bring him within the Statute of Limitations, notwithstanding any defect or invalidity in the deed under which he held. I need not refer to the case at length, as it is fully reported.

The rule in England has ever been, and is yet, that to enable a party to acquire title to lands by possession, the possession must be by actual enclosure or cultivation. The rule in *Cunard v. Irvine* was a very important relaxation of this principle, based on the difference of our position, as described

by Judge STORY, cited in *Angell on Limitations*, 419, 420. This relaxation was deliberately adopted by the Court. It has ever since been recognized and acted upon as a wise and salutary rule, and has governed every decision since given in the numerous cases which have arisen. It was decided in 1853, in the first Term to which our Law Reports extend, and has so beneficially regulated and settled the law on this subject, that among the cases reported there is none which has extended or limited the principles sustained by the case; viz.:—1. That while, in cases where the occupant does not hold under a deed, his possession of all that he has not enclosed or cultivated is a mere *possessio pedis*, and is not affected by the Statute of Limitations so as to give him title: yet,—2. That when there has been adverse possession of a part under a deed, however invalid, the Statute will operate on the whole tract purporting to be conveyed by a deed.

In this case a part, that is, the mill site and yard, were actually occupied, and to those the defendant has acquired title. If he has obtained title to the remainder, it must be by virtue of the two partial surveys in 1841 and 1852, coupled with the actual occupation of the mill site, that being the only actual occupation extending back for twenty years. To give this effect to these surveys would be to go further than the court have ever gone, either in *Cunard v. Irvine* or any subsequent case.

There are two cases however in our reports which at first sight may seem to contradict this statement. The first is *Lessee of Phalen v. Phalen*, James' R., 184, in which the plaintiff, intending to take possession of land granted to him, mistook the location and occupied another tract, a part of which he cultivated for some twenty-five or twenty-seven years. The tract was defined by plans and surveys, and the occupation, though mistaken, was *bonafide*. Under these circumstances he let into possession about fourteen or fifteen years before the trial, his son, as his tenant, under whom the defendant claimed, and the court held that the possession of the son, as his father's tenant, was not adverse, but in fact the tenancy of the plaintiff, and could not be set up in an action of ejectment brought by the grantee of the landlord in his name.

In *Smith v. McDonald*, 1 Oldright, 278, the defendant had possession of and had cultivated and built upon the most valuable part of a tract of land for more than twenty years before the plaintiff obtained a grant of the same lot. The land had been originally set off to one *Beaton*, as his own, by a government surveyor who put him in possession, *Beaton* paying him for the survey. After six years *Beaton* sold to defendant's grandfather, and put him in possession of the lot, but gave him no deed. It was held that, although, for this reason, the possession of *Beaton* and of the defendant's ancestor could not be connected so as to make title by possession to any part of the lot, yet under the statute, 21 Jac. I., c. 14, which prevents the crown from granting after it has been out of possession for twenty years, without inquest of office, the possession of defendant and his ancestor for over twenty years, being *bona fide* and defined by the survey to *Beaton* and by continued possession by the same lines afterwards, was sufficient as against the crown to avoid the grant to the plaintiff on account of the land not having been previously escheated. Neither of these cases therefore infringes upon the principle that a trespasser,—a man without any *bona fide* claim or pretence of claiming,—cannot, by any secret survey, or by any number of acts of trespass, without having a deed of the land under which he claims it as his own property, acquire title to a tract of unenclosed land.

The defendant, therefore, under the principles which I have stated, cannot, under the evidence in this case, be held to have acquired title beyond the mill site and yard, of which alone he has had an actual possession of twenty years. I am therefore of opinion that the rule *nisi* for a new trial should be discharged with costs.

As for the question of misdirection, the learned Judge directed the jury: 1st—That the plaintiff had proved a documentary title; and, 2nd—That the defendant had failed in proving a possessory title. The former of those directions was erroneous, because we hold that the documents in proof of it were improperly received. But inasmuch as I am of opinion that proof of title under the pleadings was unnecessary, and that the plaintiffs are entitled to recover, not on their title, but on

their possession admitted by the pleadings, this direction of the learned Judge was upon a point which we hold (that is, if my opinion is sustained by the rest of the Court) to have been immaterial, and therefore the misdirection is no ground for setting aside the verdict. The two questions were stated to the jury separately and distinctly. There is no reason to believe that any injustice was done to defendants by the misdirection as to the plaintiffs' title. On the second point, the defendants' possessory title, the jury found in favor of the plaintiff, in accordance with the charge, which I consider to have been correct, and therefore I am of opinion that the verdict should stand.

YOUNG, C. J., said he concurred in the judgment prepared by Mr. Justice JAMES, which was both exhaustive and able. The legal principle laid down was a very important one, especially in this country, that no possession availed beyond the bare *possessio pedis*, unless the party claiming had a paper title: that paper title might be defective,—to what extent defective had not yet been settled,—and still avail.

DESBARRES, J., concurred.

WILKINS, J., said he had arrived at the same conclusion as his learned brother, Mr. Justice JAMES, though he differed as to the mode of arriving at that conclusion.

McDONALD, J., concurred in the judgment of the Court.

IN RE PRECEDENCE OF RITCHIE, Q. C.

Chapters 20 and 21 of the N. S. Acts of 1874, respecting the appointment of Queen's Counsel and the regulation of precedence at the Bar of N. S. by the Lieut. Governor of the Province in Council, are *intra vires*, but the latter is not to be construed as retrospective in its effect. JAMES, J., dissenting as to the latter Act not being retrospective.

The old Great Seal of the Province—that in use since 1837—used on patents appointing Queen's Counsel and regulating precedence at the Bar in 1876, ceased to be the Great Seal of the Province on the transmission of a new Great Seal to the Lieut. Governor in December, 1880, though not adopted or proclaimed by the Lieut. Governor in Council.

JAMES, J., dissenting. WILKINS, J., agreeing, but expressing the opinion that the presence of a Great Seal on the document in question, affixed by the proper officers, raised a conclusive presumption as to its validity.

The Legislature of Nova Scotia, by chapter 20 of the Acts of 1874, declared and enacted that it was lawful for the Lieu-

enant Governor, by letters patent under the Great Seal of the Province, to appoint from among the members of the Bar of Nova Scotia such persons as he might deem right, to be, during pleasure, provincial officers under the name of Her Majesty's Counsel Learned in the Law for the Province of Nova Scotia; and by chapter 21 of the Acts of 1874, entitled "An act to regulate the Precedence of the Bar in Nova Scotia," the Legislature enacted among other things, by section 2, that members of the Bar from time to time appointed after the first day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom from time to time patents of precedence were granted, should severally have such precedence in such Courts, as might be assigned to them by letters patent, which might be issued by the Lieutenant Governor under the Great Seal of the Province. By letters patent dated the 26th day of May, 1876, purporting to be under the Great Seal of the Province, seventeen members of the Bar were appointed Queen's Counsel for Nova Scotia, and a new order of precedence was established, under which precedence and preaudience before *Mr. Ritchie, Q.C.*, appointed Q.C. by the Governor General of the Dominion, Dec. 26, 1872, were given to several persons who did not before enjoy such precedence and preaudience. This patent of precedence was attacked on the grounds, first, that chapters 20 and 21 of the Acts of 1874, above referred to, were *ultra vires*, and the appointments thereunder invalid, and secondly, that section 2 of the Act of 1874, enabling the Governor in Council to regulate the precedence of Queen's Counsel, could not be construed to have a retrospective operation so as to interfere with the precedence of *Mr. Ritchie*. Another question arose unexpectedly in the course of the argument as to the legality of the seal affixed to the letters patent, which was the old seal of the Province which had been in use ever since 1837, whereas it was contended on behalf of *Mr. Ritchie* that the seal had been changed and a new seal appointed to be used, without which the letters patent were of no validity. The correspondence between the Imperial, Dominion, and Provincial governments with reference to the changing of the seal is carefully summarised by His Lordship the Chief Justice, commencing with the sixth para-

graph of his judgment, and should be read at this stage in order to understand the argument of Counsel, which was directed to the question of the sealing.

Thompson, in support of the rule *nisi* attacking the patent of precedence.—Mr. Ritchie's patent under the Great Seal of Canada not only made him a Queen's Counsel, but established his precedence. Those letters patent require the Courts of Nova Scotia to grant him precedence from the 26th of Dec. 1872 in all proceedings in the Courts. Under the patent granted by the Lieutenant Governor dated May 26th, 1876, the Prothonotary changed the order of precedence that had up to that time been observed, and in order to meet the difficulty, that right of precedence might be lost by waiver, the Prothonotary was instructed to enter Mr. Ritchie's causes in the true order, and Mr. Ritchie was told to bring the matter before the Court.

I contend that the Act of the Province of Nova Scotia, cap. 21 of 1874, is not retrospective in its operation, even admitting that it is *intra vires*. It was not intended to interfere with the position of Queen's Counsel previously appointed by the Governor General, but simply to enable the Lieut.-Governor to regulate the precedence *inter se* of the Queen's Counsel that he should appoint. Assuming the act to be designed to interfere with the position of Queen's Counsel who had been appointed by the Governor General, it is clearly *ultra vires*.

We contend upon the same constitutional principle as that on which the right to establish a great seal depends, that Her Majesty, being the fountain of honour, has the sole right to create her officers and especially Counsel in her various Courts. That this right existed in the Provincial Government prior to the Union could not be questioned. It was exercised by the Lieutenant Governor and his Council as the immediate representative of Her Majesty; but since the Union there has been but one representative of Her Majesty clothed with any of her prerogatives, and that is the Governor General of the Dominion. We therefore contend that the appointment of Queen's Counsel and the regulation of precedence in her Courts must be done either by Her Majesty or her immediate deputy, the Governor General of the Dominion. The com-

mission of the Governor General appears in the sessional papers, Vol. 1, number 7, of 1867-8. The 10th section of the Royal Instructions accompanying the commission vests in the Governor General the power to appoint such officers as Her Majesty had a right to appoint before.

Weatherbe, Q. C., objects to the reading of the papers last referred to, as they are not in the rule *nisi* or before the Court.

Thompson.—Not only is the statute of 1874 not retrospective, but it saves the right of all persons appointed under letters patent previous to the passage of the B. N. A. Act, and enacts that precedence shall be assigned only by letters patent issued under the Great Seal of the Province. Now it is expressly stated in Mr. Ritchie's affidavit that no letters patent have been issued to Mr. LeNoir. Letters patent to appoint to an office are one thing, and letters patent of precedence are another. A person may be appointed Queen's Counsel under letters patent, and yet have no precedence unless given by separate letters or in the letters patent appointing him.

Even supposing that, under the Act of 1874, a patent of precedence could be issued, giving Mr. LeNoir precedence of the Queen's Counsel previously appointed by the Governor General, and whose precedence had been fixed long before, it was made essential by the Act of 1874, that the precedence so to be given should be by letters patent under the Great Seal of the Province.

Now we contend that the patent of precedence is invalid, as it is not sealed with the Great Seal of the Province of Nova Scotia, but with the old seal, which had been superceded, and ordered to be delivered up to be broken. It will not be contested that the Queen, being the fountain of honour, has the right to establish armorial bearings and appoint a seal for this Province. She has done so, and in the exercise of her prerogative in that particular she has gone on to declare, after having assigned armorial bearings to the several Provinces, &c., that this shall be sufficient warrant for that purpose, and that all public functionaries shall forthwith take notice, &c. That warrant having once been made and recorded in the college of arms, it required nothing further than the public an-

nouncement of it to make it the law of this country. The mere publication in the *Canada Gazette* by virtue of the statute of 1869 is sufficient, and that publication avoids the necessity of anything further. It is a mere question of evidence whether we have it in such form that it can be received in our Courts. But a further step was taken. Prior to the publication in the *Canada Gazette* on the 8th May, 1869, there was a despatch from Lord Granville to Sir John Young. Alluding to a previous despatch enclosing armorial bearings he says:—I have the honor of transmitting five seals, and requesting that the old seals should be given up. That is as strong an expression of the will of the Sovereign, as the circumstances would admit of. There was first of all the establishment of armorial bearings; secondly, all public officers were called upon to take notice of it, and, lastly, the seals themselves were transmitted, with a command that the old seals should be returned to be defaced. It seems contrary to common sense to contend that, after the declaration of Her Majesty's pleasure, that the old seals should be sent home to be defaced, that seal had any more validity as the seal of the Province at all. Following all this is the order of the Governor General, commanding that hereafter (that is after the 16th Nov., 1869), that seal shall be used, and publication in the *Gazette* on the 20th November, after which the new seal became the only valid seal for all purposes.

Even assuming the patent of precedence to be valid, it does not in its terms regulate in any valid way the precedence of the Bar in such a manner as to deprive Mr. Ritchie of the precedence previously enjoyed by him. The letters patent set out with the statement that their only purpose is to regulate the precedence of "the said several Counsel learned in the law," being the persons previously named in the patent, of whom Mr. Ritchie is not one. Therefore all that those letters can be held to do even if valid is to regulate the precedence of the Counsel therein named among themselves. Under the Act of 1874, Mr. Ritchie retained the precedence given to him by the letters patent, appointing him a Queen's Counsel, until letters patent granting him other precedence should be issued under the great seal of the Province, assuming that the pre-

sent government had the power to change the order of precedence so far as he was concerned. But no patent was issued to him giving him precedence, and his precedence was not in any way affected by the terms of these letters patent. They do not even profess to affect that precedence.

Now it is stated in Mr. Ritchie's affidavit that when his time came to move in one of his causes at Chambers on the Equity side, he observed that the order had been changed, and he then called the attention of the Court to the circumstance, when it was directed that the matter should be argued before the Court during the present term. It was, as we thought, not only the more convenient, but the only regular mode, to apply by a special motion to have his rank and precedence fixed. For that purpose it was brought before the Court on affidavits prepared for the purpose. The same course has been pursued on several occasions in the Court of Common Pleas and in the Queen's Bench in Westminster, in cases that will be referred to presently.

To show the distinction between patents giving precedence and patents appointing, I cite *5 B. & S.*, 722, and *1 Tidd's Pract.*, 41. On the subject of the act not being retrospective, see *Sedgewick on the Construction of Statutes*, 161, 164; *15 Ad. & El., N. S.*, 987.

Weatherbe, Q. C., (with whom was *Haliburton, Q. C.*), contra, took a preliminary objection, which he argued at considerable length, to the reading of any affidavits or papers in support of the rule *nisi* other than those upon which the rule was taken, citing *Chitty's Arch.*, 1587; *10 C. B.*, 494. Fresh affidavits could only be introduced in answer to new matter, and the application for leave to introduce such affidavits must be a distinct motion, and must be made before the cause came on for argument. He contended further that the new matter, *i. e.*, the affidavit of Thompson, verifying the printed correspondence laid on the table of the House, had only been introduced for the single purpose of resisting the adjournment asked for on last Wednesday and could not be used in opposing the rule *nisi*. The affidavit in question had not been tendered or read in the opening of the rule and could not be

read on account of the further objection that it was not headed in the matter before the Court. Mr. Ritchie's affidavit should be entitled in the matter.

The COURT, after hearing the argument on the technical objections, announced, *per* Sir WM. YOUNG, C. J., that they had taken the responsibility of receiving all the public documents that had been produced to the Court, as the ground of their judgment, WILKINS, J., adding that if that decision was to be attacked it must be attacked before an appellate Court.

Weatherbe, Q. C., continued.—The only process for attacking a patent is that of *scire facias*. Patents of precedence are on no different footing from that of any other patents under the great seal. (WILKINS, J.—Suppose objections were taken to a grant under this seal, must we have a *scire facias*?) The practice here must be the practice of 1 William IV., as there is no other practice provided by statute. *Prima facie* the seal is good, and a clear and distinct legal case must be made out against it.

The grounds set out in the rule *nisi* are not sufficient. The Great Seal is attacked without stating the grounds upon which it is contended that it is invalid. Further than that, the affidavits are not properly headed. When you attack the position of a Barrister, you must head the affidavits "In the matter of, &c." Here the affidavits should have been headed "In the matter of J. N. Ritchie, a Barrister of this Court."

Even assuming that Mr. LeNoir's patent is bad, I intend to show that Mr. Ritchie's is defective, and then Mr. LeNoir, being senior, admittedly, stands before Mr. Ritchie.

The Dominion Government has no authority or power to interfere with precedence in our Courts, and any exercise of such pretended power is *ultra vires*. *B. N. A. Act*, sec. 92, sub-sec. 14; *R. S.*, cap. 93. The first section of the chapter last cited enacts that no person shall practice as an Attorney or Barrister unless he shall have been duly admitted. That Statute is by the Imperial Act retained until it is repealed, and therefore the Attorney General of the Dominion himself could not practice in this Court. The Attorney General of Canada can be a party to an action in this Court, because the

Dominion Act gives power to the Minister of Justice to institute actions in this Court, but it is only as a party that he does so. To come in as an attorney, he must serve under articles or be admitted under some other clause of the Act.

(WILKINS, J.—No constitutional changes have affected the position of this Court as the Queen's Court. Now, as the fountain of honor, she can, of course, dispense any honors she pleases, in this, her Court. Has that been delegated to the Governor-General?) The Lieutenant-Governor represents the Queen in this province.

The Local Legislature gets the power to regulate precedence at this Bar from the Imperial Act, and if the Lieutenant-Governor in Council has the power to grant precedence at all he can take the youngest Barrister and put him over all others. The British North American Act gives the Legislature of this Province power to pass an act enabling the Lieutenant-Governor in Council to appoint Queen's Counsel and give them precedence as I have contended, and if so, no act of the Governor-General in the face of that Act can touch the Counsel so appointed. The Act of the Local Legislature, which was perfectly within the competence of the Legislature under the British North America Act, and which has been assented to by the Queen, gives the Local Government a right to appoint Queen's Counsel and give them a precedence over any person not a Queen's Counsel. It gives them power further to regulate the precedence of this Bar whenever they choose to exercise such power.

(WILKINS, J.—To the exclusion of the prerogative?) I have no doubt that that Act is above the Queen's prerogative.

(WILKINS, J.—Nothing of the kind. Such a construction is precluded by the familiar principle that the Queen is not affected unless named in the Act.) I admit it could not be done independently of express sanction, or of implied sanction as in this case by assenting to the Act. The moment the Queen assented to that Act she parted with so much of her prerogative, that the Local Government could place the youngest member of the Bar over the oldest member in stuff. That is admitted on all hands, and if the patent of the Local Government can interfere with a position established by

statute, *a fortiori*, it can interfere with a position depending merely upon a patent of the Governor-General. The patent of the Governor-General is not stronger than an Act of our Legislature.

The warrant of May, so far as relates to this Province, is *ultra vires*.—That has been admitted with regard to Ontario and Quebec, and Sir John A. Macdonald has expressed his opinion to the same effect as to its operation in Nova Scotia. If the mere fact of seeing the proclamation in the *Gazette* is sufficient to warrant the statement that a new seal had been brought into force in Nova Scotia, the same grounds would warrant a similar statement in regard to Ontario and Quebec, which are also mentioned in the warrant. The publication in the *Gazette* was for the sole purpose of proclaiming the Great Seal of the Dominion, and had no more effect upon the Seal of Nova Scotia than upon those of Ontario and Quebec, as to which it is admitted to be powerless. It is clear from the dates and terms of the correspondence that the enforcement of the seal has been held in abeyance, and the new seal could not, as has been argued, have been brought into force by the publication in the *Canada Gazette*, because that publication was in the *Gazette* of the 20th November, while the despatch of the Secretary of State, four days later, Nov. 24, 1869, states that the Great Seal is yet to be sent, and the despatch of General Doyle, acknowledging the receipt of it, is dated the 10th December, 1869. The proclamation in the *Canada Gazette* could not give the new seal validity; publication in the *Provincial Gazette* was essential to the completion of the change. An impression of the Great Seal was asked for through Earl Kimberly, and Governor Archibald sent two impressions, which must have been from the old seal, as Crosskill, the Deputy Provincial Secretary, has sworn that the old seal was the only one that had ever been used by the Government.

There are numerous instances in the history of England in which the seals of deceased sovereigns have been used by their successors. For instance, the seal of James I. was used by Charles I., his successor, and after the Restoration the seal of the Commonwealth was still used. The cases all seem to establish that the old seal must be destroyed before a new

seal can be considered a valid one. In one case where an Irish Chancellor was appointed, but his predecessor retained and refused to give up the seal, the new Chancellor did not attempt to use a new seal, because the old one had not been broken up, and finally resorted to the expedient of solemnly damning the old seal that was in the hands of the previous Chancellor. There must be something definite to determine the time at which the new seal is to be used, and that could only have been done by a Minute of Council of the Local Government. The fact of the seal having been sent to Governor Doyle proves nothing. It was sent in order that the Provincial Governor in Council might adopt it if he saw fit, or that it might remain there, to be used by the Provincial Government, if the negotiation that was going on should result in a determination that the new seal was to be insisted upon. The circular despatch of Earl Kimberly would not have been sent had he regarded the new seal as the real seal of the Province, because that had just been sent out, and it was not the new seal but the old one which was sent to him, and would now no doubt be found in the College of Heraldry as the Seal of Nova Scotia.

The practice attempted to be pursued here is an entirely novel and unauthorized one, and the Court can not sustain it.

Haliburton, Q. C.—This is the first time in the history of the British Empire, in which any court has been called on to enquire into the validity of the Great Seal. The very fact that we are the laughing-stock of the world, from there being some question as to whether our most solemn and important public Acts are not void on account of far-fetched arguments, derived from some of the obsolete absurdities of heraldry that still cling to the Old World, should make us look closely into the matter. In most of such cases we find the absurdities and anomalies are those arising from a hasty construction of the law, and that the law itself is founded on good grounds, and on common sense.

I will first deal with the more important question of the Great Seal of the Province, the validity of which has been questioned. At the outset, on one point, I will go farther than

the learned Queen's Counsel associated with me has gone, and maintain that the Great Seal is greater than the Court, and that the *Judges are bound to recognize it* when it has been proved to come from the keeper of the Great Seal, and especially when it is accompanied by affidavits of the proper officials, stating that the only Great Seal that has been issued and recognized as such has been attached to the paper, and that no question had ever been raised as to its validity.

In 17 *Viner*, 71, 78, it is stated that,—"The Great Seal shall always be credited, and, where the certificates under it are not strictly true, there is no remedy but an act of Parliament, or the authority of the Chancellor of England (the keeper of the Great Seal) to cause parties to bring them into Chancery to be cancelled. *Viner* says that "the Seal of the C. B. and B. R., or Exchequer, do not carry the same force nor import such truth." The reports of State Trials prove that the Great Seal must be officially recognized by the Court. "The deed of a subject" *Viner* says, "has relation to time of delivery, but not of date; but the King's charter is different, inasmuch as such matters of record import truth in them."

The only authority that can enquire into the validity of a Great Seal, which has been officially used as such in any matter, is the keeper of the Great Seal. The very delivery of the Seal makes him in England the first subject of the realm. It was his province to cancel all grants irregularly or improperly issued; hence he was called the *Chancellor*, and in the Court the *Chancery Court*, a *cancellando*. The mere act of the King handing the Great Seal to a subject, even though not a lawyer, makes him the highest Judge in the land; and where several Commissioners are appointed to take charge of the Great Seal, they all sit together as Lord Chancellors in the Chancery Court.

No Court can ask any questions as to whether the proceedings before using the Great Seal have been regular or not. Everything has to be assumed to be correct. It is like the King's ring in ancient times, which, handed to a subject, was his warrant in grave emergencies. *Prynne*, the Puritan, when the Great Seal was carried off by Charles I., and the question was being debated, of making a new Seal, wrote a pamphlet

on the subject for the use of the Parliament. The motto was such an apt one that I am compelled to quote it,—for even in that remote age the same prestige was attached to the Great Seal, which could not be questioned by any one. "Write in the King's name and seal it with the King's ring, for the writing which is written in the King's name, and sealed with the King's ring, may no man reverse." Esther viii. 8.

The proper care and use of the Great Seal are by our laws ensured by most severe penalties. The Lord Chancellor was guilty of treason formerly, if he even used the Great Seal without the sign manual of the King, and imitating or forging the Great Seal was treason.

But even if the Court here can do what has never been done before this in the Empire by any Court, enquire into the custody and history of the Great Seal, and the relations between the Sovereign and her keeper of the Great Seal in this Province, (the Lieutenant Governor), yet the validity of the Great Seal cannot be impugned. Even in England, where the Sovereign often delivers the Great Seal personally to the keeper, yet mere delivery, even there, is not sufficient. It must be delivery of record; the record being made in the keeper's office in the close rolls of Chancery. The very hour when the new Seal is delivered, and when the old Seal is given up, is entered most circumstantially. Then follows an announcement in the Chancery Court of the change, and there is also a public proclamation of the new Seal.

These three conditions, so peculiarly needed and so indispensable in the colonies, in order to prevent mistake or surprise, have been entirely ignored. We have had no proclamation of the Great Seal having been changed. The warrant commanding that it should be changed was published in the *Canada Gazette*, but that would not be a proclamation such as is needed, for the new seal did not reach the Province for weeks at least after the *Gazette* appeared. There was no "*delivery of record*," no entry in Council books, no notice in the Courts of law, and no proclamation of the delivery of the new Seal in the *Royal Gazette*, where all similar notices appear. If the Governor were still Chancellor, and our Chancery Court were still in existence, it is probable that any change

of seal would have been entered both in the Minutes of Council and also in the rolls of the Court, announced in the Court, and then proclaimed in the official *Royal Gazette* of the Province. The records of the proceedings of the Lieutenant Governor are kept in the minute book of the Executive Council, and an entry should in any such case be made by order of the Governor in Council.

Any change in the Great Seal must be carried into operation by the Governor in Council. Any other idea would be absurd and would lead to most disastrous consequences. In old times when Ireland had a legislature, and was regarded as "a colony," on one occasion when a Royal Warrant was received commanding that the old seal should be given up, and a new one substituted, the change was carried out by an act of the Irish Parliament.

It would seem that a mere warrant of the Crown was not held to do more than express the wish of the Crown. It was evidently supposed to require an Act of the Irish Parliament to carry the wish into effect. A curious distinction is drawn between the sign manual attached to the warrant and the Great Seal. The one is held to grant or convey nothing whatever, and to be only an expression of the wish and of the will of the Crown. The Great Seal *effectuates* the wish where it can lawfully be effected.

But the British North America Act, passed by the Imperial Parliament, and assented to by the Crown, shows how it was assumed that the Great Seals of the Provinces would be changed. As two new Provinces were made out of the old Provinces of Upper and Lower Canada, the Act enabled the seals of those Provinces to be used by Ontario and Quebec respectively, until they should be changed. And the Act went further and stated the mode in which it was assumed the seals would be changed; "*until altered by the Lieut. Governor in Council.*" No one can pretend that there was any intention of placing those Provinces in this respect on a different footing from all the other Provinces of the Dominion. It was simply *declaratory* of the way in which the Imperial Parliament assumed that a Province would alter its seal.

Sir John Macdonald argued that, the Lieut. Governor being appointed by the Governor General, the great seal should be changed by the Governor General, and not by the Queen. If the Lieut. Governor or any other official is the keeper of the Great Seal for the Province of Nova Scotia, no matter what his relations may be with the Governor General, when the Great Seal is used by him it must be received in our Courts of Law, and no one but Her Majesty and Her Majesty's keeper of the Great Seal here has any power to enquire into communications that may have passed between them. If, however, Sir John Macdonald is right, the question is settled, for the seal is not the Queen's, but the Governor General's "Great Seal for the Province of Nova Scotia"—and the seal must be changed by formal proceedings either on the part of the Dominion or of the Local Government.

To maintain that this loose and unfinished correspondence between Downing Street and Ottawa, and Ottawa and the Lieutenant-Governor, and the Lieutenant-Governor and his Council, is, with all the doubts and blunders connected with the subject, to be regarded as the same as the strict formalities that in England mark *the very hour* when the Great Seal is changed, is too monstrous to be listened to. But when it is simply impossible to fix a limit to the chaos which any other decision except that which we contend for would entail, when no human being can tell within several weeks the hour when grants signed by the old seal ceased to be valid, it is the duty of the Court to exercise their ingenuity not to clog the wheels of the State, but to save the public from useless loss and injury, and to demand that every formality shall have been strictly observed, and every doubt removed, before they allow a quaint curiosity of mediæval times to affect the administration of the government of this country.

Even if Mr. Ritchie's patent is good, the Government can grant precedence to a barrister next to the Attorney and Solicitor Generals, and before all the Q. C's., and there is nothing to prevent the Government from placing other Queen's Counsel, and even members of the outer Bar over the head of Mr. Ritchie. No one questions the right of the Provincial Government to regulate precedence in that manner, the Col-

onial office having conceded the point before the Act was passed.

The authorities for the positions I have taken are 8 *Scott*, 30 ; *Hale's P. C.*, 175 ; 2 *Campbell's Lives of the Chancellors*, p. 34, note, p. 114, 494 ; 5 *Id.*, 431 ; *Macaulay's History of England*, vol. 2, p. 402 ; 6 *Lord's Journals*, 252, 263 ; 3 *Campbell's Lives of the Chancellors* 33, 38, 393 ; 1 *O'Flanigan's Lives of the Chancellors*, 131, 15 ; 3 *Nelson's Abr.*, 207, 210 ; 3 *Stephens' Com.*, 384 ; *Tomlin's Dictionary*, Title, "Treason."

McDonald, Q. C., in reply.—The question that has arisen out of the rule *nisi* in this case is one of the utmost importance, and it was the duty of every gentleman who was served with the rule, and of the Attorney General, upon having the nature of the question brought to his notice, to be present and to afford to the Court such light as their learning and legal ability would enable them to throw upon the subject. As to the preliminary objection taken to the heading of the affidavit, I contend under the authority of 4 *D. & L.*, 427, that no heading was necessary, but in order that no risk should be run, I have submitted a new affidavit, under the authority contained in the rule to adjourn the argument, formally verifying the documents already before the Court. Since the Act of Union in 1867, the only representative of the Sovereign in this country is the Governor General, who therefore alone possesses the power of dispensing the honor of being Queen's Counsel and enjoying pre-audience in Her Majesty's Courts. The Lieutenant Governor has no authority to exercise the prerogative of creating Queen's Counsel, as he ceased, on the passage of the Union Act, to be the direct representative of the Sovereign. The Acts of the Local Legislature professing to confer this power are *ultra vires*, and being so in themselves cannot have any further force imparted to them by the assent of the Governor General. Conceding, for the sake of argument, that the assent of the Governor General would impart validity to such acts, they have never been assented to. All that could be said of them, at the most, is that they have not been disallowed. Even the Act of the Local Legislature under which the Government

claim the right to create new Queen's Counsel, and assign precedence to them, did not authorize the issue of such a patent as that attacked by the present rule *nisi*. It did not enable the Government to assign to the Queen's Counsel created by them a precedence over those created by the Dominion Government, and a careful reading of the local Act would show that the patent in question goes farther than the Act permits.

The published correspondence shows that the new seal has been insisted upon by the Home authorities as the only legal seal, and the time when beyond a doubt that seal became the only legal seal of the Province was the date of its reception by the Governor of the Province. The interval between the proclamation in the *Canada Gazette* and the reception of the seal, a period of twenty days, was an interregnum as to which the Court is not called upon to decide. I incline to hold that the Court would look favorably upon a document sealed with the old seal during that period, but it is not necessary to determine the point. As to the subsequent period there can be no doubt that the new seal could alone be properly used for the sealing of all public documents requiring to be authenticated by the great seal, and the argument that, although the wrong seal has been used, the court can not look at it simply because it is countersigned by the keeper of the seal, is absurd. The contention that none but the Chancellor can inquire into such a matter would lead to the criminal being his own judge. The question is one affecting the rights of a barrister of the court, and it is one in which pecuniary interests are involved. There is, therefore, no tribunal that could more appropriately take cognizance of it than the Supreme Court of the Province.

Cites *1 May*, 170 ; *Hallam's Const. History*, 327 ; *3 Com. Dig.*, 345, "patent."

YOUNG, C. J., now (March 26th, 1877), delivered the judgment of the Court :—

Several members of the Bar of this Province having been appointed by the Governor General Queen's Counsel, after the 1st July, 1867, when the Dominion Act came into operation questions arose here and in Ontario as to the appointment and

precedence of Queen's Counsel, which resulted in two Acts passed in the latter Province in 1873, chaps. 3 and 4, and two in our own in 1874, chaps. 20 and 21. These Acts closely resemble each other, but differ in some particulars. Our chapter 20, affirming the right of the Lieutenant Governor to appoint Queen's Counsel, is a declaratory Act, which the corresponding Ontario Act is not. The second clause of the Ontario Act, chap. 21, enabling the Lieut.-Governor to grant to any member of the Bar a patent of precedence in the Courts of that Province, is not in ours, though both Acts authorize the issue of such patents, and all the Acts require that the letters patent for the appointment of Queen's Counsel and for the granting of precedence shall be under the Great Seals of the respective Provinces.

The correspondence which led to these Acts is to be found in the Dominion Sessional papers for 1873, No. 50, and it is strange that no reference was made to it in the recent argument of this case. *Lord Kimberley's* despatch of 1st February, 1872, is a public document, having a significant bearing on the point now before us. After stating that a Lieut.-Governor appointed since the union came into effect had no power to appoint Queen's Counsel, he says, "I am further advised that the Legislature of a Province can confer by statute on its Lieut.-Governor the power of such appointment, and with respect to precedence and pre-audience, in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieut.-Governor, as above explained." It is to be noted that both the Minister of Justice and the Privy Council of Canada recognize the right of Her Majesty directly, as well as through her representative, the Governor-General, of selecting from the Bars of the several Provinces her own Counsel, and as the fountain of honor, of giving them such precedence and pre-audience in her Courts as she thinks proper. This power, of course, still exists, and it is pointed out by the Privy Council that, when the Supreme Court or other Dominion Courts are established, commissions issued by the Lieut.-Governor would not, as of right, give precedence or position in those Courts, though it might be advisable that such commissions should be recognized.

Mr. Ritchie's patent, under the Great Seal of Canada, bears date the 27th December, 1872, and by the uniform practice of our Court, he had precedence over all the members of the Bar not holding patents prior to his own. But by letters patent, dated 26th May, 1876, purporting to be under the Great Seal of the Province and signed by the Lieutenant-Governor and the Provincial Secretary, seventeen members of the Bar were appointed Queen's Counsel for Nova Scotia, and a new order of precedence was established, as it would seem from the recital, among the several persons above, that is thereinbefore, appointed, but as it appears from the enumeration, among all the Queen's Counsel previously appointed since the 1st July, 1867, being thirty-three in all, including *Mr. Ritchie*, and giving precedence and pre-audience above him to several persons who did not enjoy it before. Upon affidavits disclosing the above and other facts and producing the original commissions and letters patent, the rule *nisi* of 3rd of January last was granted and the recent arguments were held.

Among the grounds taken in the rule it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments under them invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the acts having gone into operation, this contention is quite untenable.

Another objection, however, is of more avail as regards chapter 21, that it has not a retrospective effect. The second section is as follows: "Members of the Bar from time to time appointed after the 1st day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom from time to time patents of precedence are granted, shall severally have such precedence in such courts as may be assigned to them by letters patent, which may be issued by the Lieutenant-Governor under the great seal of the Province." At the argument it was vehemently urged upon us that this clause gave the Executive Government an absolute uncontrolled authority over the members of the bar, so that the youngest and most inexperienced among them might have precedence over the oldest and most eminent who had not become Queen's Counsel previous to the Union. Sympathizing, as

I do, with the reputation and dignity of the Bar, I am unwilling to give to this Act an interpretation so injurious to their feelings and so destructive of their rights. Is the language so strong and so clear as, for the sake of this obvious injustice, to oblige us to give it a retrospective operation? Here is a distinction, highly valued, won, in some cases at least, if not in all, by honorable service, and approved by all the world, swept away without fault and without compensation, by giving to an act of our own Legislature an effect which I think of them too highly to believe that they ever entertained or understood. But what do the true principles of construction teach us as applied to a Statute? Shall the construction of this Act be retro-active or prospective? Shall it apply to the past or only to the future? The maxim, *Nova constitutio futuris formam debet imponere non praeteritis*, adopted by this Court in *1 Oldright*, 678, is best illustrated in *Sedgwick on Statutory Law*, 161-4. A Statute which takes away or impairs any vested right acquired under existing laws is to be deemed retrospective. Statutes should have a prospective effect only, unless the language is so clear and imperative as not to admit of doubt. The principle, said the English Court, in *Moon v. Durden*, 2 Exch., 22, is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively. But I am of opinion that such an intention on the part of our Legislature is by no means clear, and therefore that the Letters Patent, although no question had been raised as to their validity, would not affect *Mr. Ritchie's* precedence.

But we all know that a very important question did most unexpectedly arise on the first day this case was argued, as to the seal impressed upon these letters, which many obvious considerations oblige us now to consider. In granting the rule *nisi*, *Mr. Ritchie's* second affidavit of the 27th December, though mentioned in it, had not been read or considered as of any consequence, and the fact of an old and a new seal was wholly unknown to the Bench till the argument was opened

on the 24th of February. The moment it was stated, and the letters patent exhibited with the old seal, while the *Canada Gazette* showed that another seal had been prepared under the Queen's warrant of 7th May, 1869, it was obvious that here was a point far transcending any question of precedence; and, the affidavits of the *Hon. Mr. Hill* and *Mr. Croskill* requiring apparently some explanation, we thought it due to them and to the public to postpone the argument for a few days. The Legislature being in session, questions were asked there, and a body of documents was discovered and printed, which were verified by *Mr. Thompson's* affidavit of 7th March, and others being expected, we passed the rule of that date; and on the 9th two other affidavits, of *Mr. Ritchie* and *Mr. Weatherbe*, came in, and on that and the succeeding day the argument was held. Now this is a delicate and a difficult question to deal with, and we shall deliberately review it, guarding ourselves from any hasty or rash conclusions. The Royal warrant of 26th May, 1868, assigning armorial bearings to the four Provinces then constituting the Dominion, and to the Dominion a common seal, to be called the "Great Seal of Canada," and to be composed of the arms of the said four Provinces quartered, was certified by the Registrar of the College of Arms at London on the 21st September, 1868, and a certified copy enclosed by the Colonial Secretary to the Governor General on the 14th October. On the 8th May, 1869, *Lord Granville*, referring to a previous correspondence not produced, and especially to a despatch of his of the 16th January, transmits to the Governor General five seals for the Dominion of Canada and the four Provinces, with the Queen's warrant of 7th May, 1869, directing and requiring that the said seals shall respectively be used for the sealing of all things whatsoever which shall pass the great seals of the Dominion and said four Provinces, and requiring the Governor General to return the old seals for the General Government of Canada and the Provincial Governments of the four Provinces, in order to their being defaced by Her Majesty in Her Privy Council. These documents, with the proclamation of the great seal of Canada, were published in the *Canada Gazette* of 20th November, 1869, which makes them evidence

for all the purposes of this argument. 1 *Greenleaf on Evidence*, (12 ed.), sec. 492; *Taylor on Evidence*, secs. 12, 11 & 24. The remaining documents are derived from the printed papers communicated to the Assembly on the faith of the Local Government, and their admissibility as evidence may be open to objection, though the peculiar circumstances of this case rendered it indispensable to consider them. On the 2nd July, 1869, the Governor-General enclosed to Lord Granville a minute of the Minister of Justice of the 25th of June, 1869. It refers to a despatch from the Duke of Buckingham, dated 1st June, 1869, addressed to the Governor-General with three seals for the Dominion of Canada and the Provinces of Ontario and Quebec respectively, accompanied by the Queen's warrant, ordering them to be used until others of a different and more elaborate design should be substituted for them. The 136 sec. of the Dominion Act as to the seals of Ontario and Quebec had at this time escaped observation, and there is no reference apparently to the seals of Nova Scotia and New Brunswick. The Minister of Justice, Sir John A. Macdonald, then proceeds to say, "There can be no doubt that Her Majesty has the sole power to alter and to change, at will, the Great Seal of the Dominion. A question, however, arises whether, under the British North American Act of 1867, and under the altered position of the Provinces caused by that Act, the power to fix the Great Seals of those Provinces does not rest elsewhere,"—in other words, with the Governor-General. He then refers to the 136th section of the Act. In the reply of Lord Granville on the 25th August, 1869, after asserting the sole power of Her Majesty to order and to change at will the Great Seal of the Dominion, His Lordship adds: "Nor do I entertain any doubt that in Her Majesty alone is vested a like power with respect to the Great Seals of New Brunswick and Nova Scotia." He then suggests what will probably be the most convenient course for the future, adding that he sees no reason, as at present advised, why the power from time to time to alter the Great Seals of all the Provinces should not be vested in the respective Lieutenant-Governors. So ends the correspondence before us as between the Dominion and the home Government.

And now as to our own Province. Up to this time our Government continued of necessity to use the old seal transmitted to them at the accession of Her Majesty in 1837. We have no evidence that they had heard of the above correspondence, and no other seal had been sent to them. The idea broached at the argument that the new seal became the Great Seal of the Province at the date of the Queen's warrant of the 7th May, 1869, is untenable. Were it not so, all the functions of Government dependent on the use of the Great Seal—an election writ for example—would have been stayed. A duty would have been imposed which there was no means of fulfilling. Now, it is a maxim of the law that *Nemo tenetur ad impossibilia*, or, as the Roman law expresses it, *Impossibilium nulla obligatio est*. Up to this period there is no difficulty.

But, on the 24th November, 1869, *Mr. Howe*, then Secretary of State at Ottawa, transmits to *Sir Hastings Doyle* copies of the correspondence and of the Royal warrant of 26th May, 1868, states that the Great Seal of Nova Scotia will be forwarded on the first fitting opportunity, and winds up with this paragraph:—"Upon the delivery into your hands of the Great Seal, you will have the goodness to take measures to carry out Her Majesty's pleasure, as indicated in the accompanying correspondence, by adopting the said seal as the Great Seal of the Province of Nova Scotia. You will also be pleased to transmit to me the old seal, with a view to its being returned to Her Majesty for the purpose of being defaced." On the 10th December, 1869, *Sir Hastings* acknowledges this letter, adding: "I have also received, at the hands of the President of the Privy Council, the new Seal of the Province of Nova Scotia. I shall take the first available opportunity of transmitting the old seal to His Excellency the Governor-General, in order that it may be returned to the Secretary of State for the Colonies."

This however, was not done. The Executive Council of that day passed a minute on the 2nd February, 1870, referring to *Lord Granville's* despatch and the Dominion Act, and concluding thus:—"The Council, while freely recognizing the right of Her Majesty the Queen to change and alter the Great Seal of the Province at pleasure, respectfully submit that, as the

people are warmly attached to the seal which for a long period of time was used in sealing all Provincial documents under their old and highly valued constitution, the Government be permitted to retain the old seal instead of adopting the new one—a course which will obviate the necessity of either Imperial or local legislation on the subject.”

This minute was sent by the Lieut.-Governor on the 7th February to *Mr. Howe*, who acknowledged its receipt on the 14th, adding that the letter with its enclosure would be brought to the notice of the Governor-General, with a view to their being transmitted by him, should he see fit, to the Secretary of State for the Colonies. Whether the letter and its enclosure were transmitted or no, does not appear. The above are all the documents that are to be found in this Province throwing any light upon the subject. The letters of 1874 are of no consequence whatever.

Have the essentials, then, been complied with, or are any formalities wanting to give validity to the new seal? It was intimated at the argument that the want of a proclamation by the Local Government was fatal. Now, it is true that such a proclamation, published in our *Gazette*, acknowledging and adopting the seal, would have been a prudent step. This was done by the Dominion Government, and we find, in *Hale's Pleas of the Crown*, 177, the record of a like proclamation directed to the Sheriffs, with an impression of the new seal in wax, so far back as the reign of Edward III. But I can find no precedent or authority requiring a proclamation to be made. Why should it be required, when the Queen's warrant accompanying the seal is delivered to her representative, and by him to the officers he appoints, for their direction and guidance?

Towards the close of his address, and rather by way of suggestion than of serious argument, *Mr. Haliburton* urged that the fact of a seal being impressed upon the letters patent, authenticated as they are by the signatures of the Lieutenant Governor and the Provincial Secretary, was of itself enough to exclude all inquiry,—in other words, that it raised a conclusive presumption which no evidence could shake. Now, I will readily admit that it raises a strong *prima facie* or dis-

putable presumption, which it requires clear and unmistakeable evidence to destroy ; but I can discover no principle on which, with such evidence to meet it, it is to be received as conclusive. It is true that in many cases, as in the 27th and 30th clauses of our own evidence Act, chap. 96, seals purporting to be the seals of British, foreign and colonial courts are received to authenticate documents. This is by statute from the necessity of the case, because, otherwise, a commission would be required at enormous cost to prove every paper, and a commission would not always avail.

In *Greenleaf on Evidence*, the second chapter treats of many things that are judicially taken notice of without proof. Among these is the seal of a notary public, he being an officer recognized by the whole commercial world. Were it not so, how could the protest of a bill of exchange in a foreign country, or even in our own, be proved ? Foreign Admiralty and Maritime Courts, too, being the Courts of the civilized world and of co-ordinate jurisdiction, are judicially recognized everywhere, and their seals need not be proved. So also, the seal of the Probate Court in a Court of Law, of which we have examples every day. And by parity of reason, says *Greenleaf*, I., sec. 503, it would seem that no extraneous proof ought to be required of the seal of any department of State or public office established by law, and required or known to have a seal. This presumption arises also out of the maxim of *omnia rite acta*. But is it more than a presumption, and does it extend to the Great Seal of England or of any of her colonies, where it is the emblem of sovereignty—"the only instrument, as Lord CAMPBELL declares, by which, on solemn occasions, the will of the Sovereign can be expressed," and in the eyes of English lawyers, according to Hallam, having a sort of mysterious efficacy ?

We had much learned lore submitted to us on the ancient and modern uses and vicissitudes of the Great Seal, into which I have not thought it necessary to enter, but I may borrow from them two illustrations of the point we are now considering. *Macaulay*, in his *History of England* (II.-428), says that James II., when he fled from the Kingdom he had outraged, took the Great Seal in his hand and, as he passed Lam-

beth, flung it into the midst of the stream, whence, after ~~many~~ months, it was accidentally caught by a fishing net and dragged up. By this manœuvre His Majesty thought that he had effectually defeated the enterprise of the Prince of Orange. In the reign of George III., as Lord CAMPBELL tells us, in his life of Lord THURLOW, his house was broken into by thieves who absconded with some booty, including the Great Seal inclosed in the two bags so often described in the Close Roll one of leather, the other of silk. A Council was immediately called and by the following day a new great seal was made, and next year, in 1785, a third great seal was ordered, the stolen one having never been recovered. Now, suppose this stolen seal, or the seal cast into the Thames, had fallen into evil hands and been impressed upon a royal grant of land or forest, would it have carried any weight; would the presumption in its favor have been conclusive? When it is said in *Viner's Abr.*, XVII., 71, and in other of the old books, that the Great Seal shall be always credited, and, where the certificate under it is not strictly true, there is no remedy but an Act of Parliament or by authority of the Chancellor, it refers to cases where the real seal is present and is properly used.

Here we have two seals, the old one impressed upon the letters patent, as is admitted in the affidavits of the Provincial Secretary and of his Deputy, who swear, no doubt honestly believing it, "that it is the Great Seal of the Province of Nova Scotia," and we have also the new Seal with the Royal crown and the armorial bearings in the Queen's Warrant, forming one of the quarters of the Great Seal of Canada.

But while I speak of it in these terms I must not be understood as viewing with peculiar or superstitious reverence its mere device and form. I have seen contrasts between the two as works of art, and some efforts of a subtle though disguised ridicule, or of a coarser class, to disparage the one or the other. But the true way to regard both, each in its turn, is as a symbol of the supremacy of the great Empire to which we owe so much, and of the royal power which claims our affection as well as our obedience. The earliest commissions and instructions to the Governor-General, while this Province was in direct communication with the Crown, charged our

Governors, while it empowered them, "to keep and use the public seal of the Province for sealing all things whatsoever that shall pass the Great Seal." So it appears in the Journals of our Assembly for 1848 and 1865. The same injunction was repeated, and the same power conferred, in the renewed commission to Lord Monck in 1867 and the Earl of Dufferin in 1872.

So that this Court and the Government and Legislature can in no way escape from the constitutional and substantial issue,—which of the two seals after the 10th of December, 1869, was the Great Seal of Nova Scotia. It is of no consequence, as far as the point of precedence is concerned, in the view I take of it, whether upon legal principles the seal upon the letters patent is to be presumed to be the true seal or no. Upon the evidence in the *Gazette*, were there nothing else, the main question reverts, which of the two seals is the seal of this Province? And I am of opinion that the new seal, after its delivery to the Lieutenant Governor in 1869, became and is now the Great Seal of Nova Scotia, and the only one. I may add that, if this opinion should turn out to be sound, I do not apprehend the evil consequences that have been pictured abroad. A remedy can be found in legislation, from what quarter or in what form it is not for this Court to suggest.

WILKINS, J. :—In my view of the case, it is not necessary for me to consider more than the following ground stated in the *rule nisi* obtained by Mr. Ritchie. It is in terms as follows :—"Because the Act of the Local Legislature, namely, "chapter 21 of the Acts of 1874, under which certain barristers were appointed Queen's Counsel by the Lieut.-Governor "of Nova Scotia, by documents or letters patent of the 27th "of May, 1876, is *ultra vires*." It appears to me that this contention is, on the clearest principles, without foundation. The statute thus questioned has in effect received the royal assent, and Her Majesty must therefore be considered thereby to have empowered her Lieut.-Governor to exercise in her name all the powers purported to be conferred on him by the statute. I am unable to conceive in what respects it can be held to involve legislation *ultra vires*. The subject of our inquiry respects the exercise of a right to appoint Queen's

Counsel for the Province. I must regard the statute as perfectly valid ; and it appears to me that, when it is construed in the only way in which it can be interpreted, the question of precedence before us is disposed of us as a legal consequence. The recital of the statute may be, by adding a few words that I distinguish by brackets, paraphrased thus :—
 “ Whereas the regulation of the Bar in Nova Scotia is vested
 “ (*sub modo*) in the Provincial Legislature, and it is expedient
 “ for the orderly conduct of business before the Provincial
 “ Courts, that provision be made for the order of precedence of
 “ the members of such Bar in such Courts, (but saving all rights
 “ of precedence heretofore, at any time granted by Her Majesty,
 “ or since the first day of July, A.D. 1867, granted by His Excellency the Governor General of Canada, to any member or
 “ members of the said Bar.”)

The question which we have to decide arises under the second clause of the statute. That clause must be so construed as not to restrict or interfere with any right of precedence at the Bar conferred on any member of it, before the passing of the Act, by the Queen—the acknowledged fountain of honor—or by any one duly authorized to confer it by Her Majesty. No such right can be judicially held to be prejudiced by the clause in question, or by the exercise of an authority under it, without violating these fundamental principles recognized as governing the construction of statutes, viz :—first, that the Sovereign is not bound by a statute by a mere implication of a legislative intention to that effect ; secondly, that vested rights are not taken away by legislation without the plainest evidence of an intention to divest them. It cannot be questioned that Her Majesty has, by assenting to this statute, expressly so far parted with Her prerogative right in the subject matter of the legislation, as to authorize, prospectively, after the passing of the Act, Her Lieutenant-Governor of this Province to exercise it to the extent in which it is necessarily conferred on that high officer by the statute. We are bound so to construe this second clause as, while giving full effect to the clear intention, not to adopt a construction that will derogate from any right which, before the Act came into operation, had been granted by Her Majesty or by an autho-

ity duly delegated by Her. The clause, then, must be so construed, as that it shall not be held to have authorized the Lieutenant-Governor to degrade any member of the Bar from that relative position at the Bar which had been specially assigned to him, directly or indirectly, by Her Majesty, in the interval that elapsed between the first day of July, 1867—the date of the Union—and the seventh day of May, A. D., 1874, when the statute in question came into operation. The clause under review may be so construed, and effect will still be given to every word in it.

Sub-section three has expressly saved certain rights in the matter of the legislation—rights conferred up to the day of the Union. No reason can be assigned, why rights of the same nature and derived from the same source and granted up to the time of the operation of the statute, were not intended to be saved also. Now, *Mr. Ritchie* had been appointed one of Her Majesty's Counsel learned in the law for this Province on the 26th of December, A. D., 1872, by letters patent under the Great Seal of the Dominion, by the Governor-General in the name of Her Majesty. On His Excellency Her Majesty had before then conferred the right to make such appointments; and, by virtue of her undoubted prerogative, Her Majesty's right to do so could no more be questioned than could have been the right granted by Her Majesty to her royal son, the heir apparent, in Her Majesty's name to bestow honors and titular dignities on selected subjects of the "Empress Queen of India," which right His Royal Highness exercised on the occasion of his visit to the East.

Mr. Ritchie's right of precedence at the Bar under the Governor-General's patent, as claimed by him, existed, and, in my opinion, remained intact, at and since the passing of the statute, and was not, in any manner, prejudicially affected by the patent granted by the Lieut.-Governor. His relative position at the Bar must be governed by the patent that he holds, so long as it remains in force, notwithstanding any patent or patents that have been or may be granted by the Lieut.-Governor of Nova Scotia under the authority of the statute in question.

There is another ground stated in the rule which, in my

view of this case already expressed, I am not required to consider. Nevertheless, although it is to me, therefore, a mere abstract question, I feel that, for a reason which I shall briefly notice, I ought to do something more than merely glance at it. It respects the validity of the seal. The same question which has been raised here regarding the legality of the letters patent of the Lieut.-Governor may be raised before one of us on his next circuit, in the form of an objection to the validity of a Crown grant of land and resting on that evidence which is before us in the present case. Such grants have probably been issued since the 10th of December, 1869, and under the very seal which has been affixed to the patent before us. At the argument of this case, adjourned as it was from time to time, it was only in the last hour of the argument that the point was taken, and by *Mr. Haliburton*, that the patent, having been confessedly countersigned by the Lieut.-Governor and the Provincial Secretary and sealed with a seal that on its face purported to be the seal of the Province of Nova Scotia, carried with it conclusive evidence to this Court of its being what it professed to be, and what, by the officers of the Government charged constitutionally with discretion as to affixing the Great Seal to such a document, it was thus dealt with as being.

Had that point been taken *in limine*, and had it then been insisted that the Court was bound, not merely to take judicial notice of the actual seal as the seal of the Province, but to exclude all evidence to the contrary; and had it been further insisted that (fraud, mistake or crime connected with the use of the seal being excluded from the case, while on the contrary, the only officers of the Government who could use the genuine legal seal of the Province for any purpose, had deliberately used this seal for the particular purpose), I should have hesitated long before I gave my consent to the introduction of the evidence before us, by the force of which it is now contended that the seal used is proved not to have been, when it was used, the one, only seal that could have been legally used. I am far, however, from regretting that that evidence was admitted. At the same time, while I say this, I distinctly reserve to myself a discretion which, as at present advised, I

as a Judge of this Court, shall exercise as to accepting or rejecting the same or the like evidence in any future analogous case that may arise before me.

The field is large of those acts and things of which an English Superior Court takes judicial notice. It includes high things and things comparatively insignificant. Among the former is the seal of the Sovereign Power in a State. Of that the public tribunals of every other civilized State take judicial notice and recognize it on inspection, without proof.

There is in the English law, as there was in the Roman law, a well known class of cases of presumptive evidence, which are absolute presumptions of law, which are not permitted to be overcome by any proof that the fact is otherwise. Does this case of a public seal of a British colony, offered as evidence of a document to which it is affixed, in a British court of that colony, range itself within that class of cases?

It must be borne in mind that we are not dealing with the case of a public seal, criminally counterfeited, and criminally abused; or with a genuine seal used and abused by those who had no right to use it. This case is very different, where lawfully constituted Provincial officers have deliberately used, and for a lawful purpose, in Her Majesty's name, this very seal in question. If this seal could, under the circumstances, be successfully impugned in this court, on the ground that another seal should have been used instead of it—so could it be, if the document were offered in evidence, and were assailed by an objection of invalidity, supported by the same evidence, in a superior court in Australia. Nay, we must go further, and consider the case of a decree of a High Court of Admiralty, pronounced in the State of Massachusetts, offered in evidence in this Court, on the authority of the seal attached to it, purporting to be the seal of the foreign court, but objected to on the ground that the seal, once valid, was no longer so, because another had been substituted by competent legal authority. How would that objection have to be dealt with? But a case is suggested to my mind that may arise in this Court to-morrow, of which the very obvious solution will go a great way to solve the question of validity raised in the present case. A Crown grant of land, as our law and practice

now are, involves evidence of an actual contract between the Crown and a subject grantee. When the latter obtains the patent, he has paid his money for the land granted. In carrying out that contract to its consummation he has nothing to do with the selection of the seal used to give efficacy to the grant, and constitute evidence of it. He knows not, and he is not supposed to know, whether the proper seal has been appended to the patent or not. He sees a seal with the Royal Arms apparent on its impression, and reads words purporting that the seal of which he sees the impression is the seal of the Province. He recognizes the signature of the Lieutenant-Governor and that of the Provincial Secretary as countersigned to the document. He knows, assuming his patent to have passed since the Union, that no political change took place on that event in the condition of the Colony which necessitated a new seal. He knows that his present Sovereign has had her sacred and valued life prolonged beyond that event, and happily still continues to reign.

In the state of things which I have supposed, would it not be perfectly monstrous to declare judicially, if that patent were relied on in an action of ejectment, that it was void, because (fraud, forgery, crime in relation to the seal in question, knowingly and deliberately used by the officers of the Government, being out of the case) there was, unknown to the grantee, in existence and accessible to those officers, another seal that had been legally substituted for the seal actually used? I might find myself compelled so to rule, but if I so decided, it would be by force of express and irresistible authority. I should reflect in such a case that it was not Her Majesty who was repudiating the seal attached to a document, issued in her name, and countersigned by her officers—the grant in effect being Her Majesty's grant—but that the validity of the seal was denied by those who would have an interest in annulling the grant.

Between a patent granting land and a patent conferring rank, there can, of course, be, as respects the effect of the seal, no difference in principle. There is a case of *Adm'r. of Priestman against Dundas*, 3 T. R., 125, which, in my judgment, as respects principles involved in it, bears strongly on the question

under review. If a party who paid a large sum of money due to the estate of a deceased person, to a false executor, under probate of a forged will, (he being unconscious of the forgery) was held, as he was in that case, to be protected by the probate under the seal of the competent Court from a claim made upon him, afterwards, by the real executor of a true will, for payment of the same debt, because the seal, of the genuineness of which he knew nothing, was his authority to pay to him who, as the event proved, had no right to receive, would that person, on any rational principle, have been less entitled to protection, if the case had been one where the officers who used the particular seal in the case first referred to had, by mistake or even by design, attached a wrong seal to the letters testamentary ?

In the case before us, the historical cases brought to our notice at the argument, of stolen Great Seals, or of Great Seals flung into the Thames by an abdicating and flying King, have, I apprehend, no particular bearing. Indeed, the use of the Great Seal in England is so guarded that, practically speaking, there scarcely exists a possibility of its being improperly used.

On the whole, the impression on my mind is very strong (though, as already observed, I am not called on to give an opinion on the point) that this Court, if required to decide, would be bound to consider the document in question, under the circumstances of the case, to be proved by *conclusive* force of the very seal that it bears, the evidence extrinsically introduced notwithstanding.

I feel it proper to add, although I am not required to say anything on the subject, that, as at present advised, on the 10th day of December, 1859—when *General Doyle* announced that a new seal was in his possession—all legal solemnities would appear to have been observed, that were necessary to substitute for the old seal a new seal of the Province by Royal authority. This, of course, is expressed in the light of the evidence before me, assuming that I am in possession of *all* the evidence. I must further observe that, in volunteering this extra-judicial opinion, I disclaim an intention to reflect in any degree on the present, or on any preceding Government,

in respect to the manner in which the Provincial Seal has been used ; and that I do not venture even to intimate to the present Government a course to be pursued by it in relation to the use of the Great Seal of Nova Scotia, or an opinion as to the obligations, past or present, on it, to use either seal. My duty is judicial ; its duty is political. Besides that, the Government is more competent than I am to deal with such a question ; and I have too great a respect for it to obtrude an opinion upon it. More than that, as I shall show presently, there is no evidence before us, in any possible view of it, that shews *conclusively* that any mistake has been made in the application to the patent in question of the seal that it bears.

Here my judicial opinion, formed according to the best of my humble judgment, ends, and my judicial functions relatively to the case, in strictness, terminate. But, as *obiter* and supplemental to that opinion, I cannot forbear from offering a few additional observations which are suggested by some peculiarities which distinguish this case from any and every case that has come before me for judicial consideration. For these observations I alone am responsible. It was said of the celebrated Dean of St. Patrick's that he could write a fine poem on a broomstick. A recollection of that suggested to my mind the thought that it was quite possible to invest a subject not important in itself with an air of transcendent importance. I have not viewed this case, so far at least as this Court is concerned with it, as very momentous. Even looking at the question of the seal involved in it which respects the Government, it is a question whether they have or have not on this particular occasion used the right seal. A possible error in that respect is only of public importance so far as it has affected or may affect rights and interests of the Queen's subjects. I do not think they can be prejudiced by that error, if it has been made. Therefore, I do not view the question as one of magnitude. In these days of rapid thought and facile intercommunication, things occurring on this side the Atlantic find their way quickly to the other side of the sea ; but I do not apprehend that intelligence received in London of this great question of the day here is likely to affect the price of Consols or to retard the much desired settlement of the Eastern question.

If a question had been raised as to whether sufficient evidence were before the Court to establish *conclusively* the proposition that the seal actually affixed to the patent in question might not be, in effect, the new and substituted seal referred to in the despatches, *i. e.*, whether the new and unseen seal in question might not, if exhibited, prove to be in its character and its die so like the old seal that an impression made by the one would be identical with an impression made by the other, it might, I say, be found under the evidence before us impossible to decide the question. According to the evidence *no eye of a deponent has seen the new seal*. It is referred to in the principal affidavit as the Great Seal of Nova Scotia *as described* in such correspondence and proclamations. But in those *it is not described at all*. The armorial bearings are described. It is stated that they are, *i. e.*, then were designed to be, borne on the Provincial seal. That they have been introduced into it is mere matter of inference, but nothing more. This question, therefore, is attended with great difficulties. I am unacquainted with the language of heraldry. I have not the benefit of the knowledge of it possessed by *Lord Howard*. I reflect, however, with pleasure on the fact that in his noble veins runs "the blood of all the Howards." He is, therefore, a nobleman who, I feel assured, would, in carrying out officially a Royal command, respect our archaic predilections, if made acquainted with them, and would not have permitted in any seal prepared for us under his auspices those picturesque associations with our early history which are graven upon our old seal to disappear upon the die of that which is to replace it. *I should therefore regard as prima facie spurious any new Pretender that did not show those credentials*. To guard against a possible deception like that, I should, as my duty would require, examine with the naked eye, and with a lens, the impression apparent on these letters patent; and should have, then, to ask myself this question: Is it quite *certain* that this impression was not made with the new seal, or with one the impression of which would be the same? He would be a man devoid of taste who would not admire the device of that seal of which the impression is before us; he would be a bold man who, after a careful inspec-

tion of the impression, in the light of the extrinsic evidence, would venture with judicial confidence to assert, in a case that demanded *conclusive* evidence, that it was not made by the old seal that exactly corresponded with the new seal.

I have intimated that the old device challenges our admiration. Let me establish that proposition. Direct the eye upon it. We behold the Royal Arms ; we discern in the legend the sacred name and the titles of Her Majesty the Queen ; we read : "*Sigillum Provinciæ Novæ Scotiæ.*" The old familiar words, "*Terræ Marisque Opes,*" read with their adjuncts, remind us that, while our hearts overflow with loyalty, our natal soil and its surrounding waters overflow, or did once overflow, with wealth, terrestrial and marine. In the back-ground of the picture we have the primeval forest, when as yet not one tree of it had succumbed to the axe of the pale-face. In the fore-ground we have unmistakably, as he was seen in the flesh, our venerated first Governor, *Cornwallis*—the only reliable portrait, as our own provincial antiquarian informs me, of that illustrious pioneer of our present high civilization. We here behold him standing proudly on the virgin beach of his recently acquired vice-regal domain, hard by that which is now the *great* city of a *great* people, trembling with *great* anxiety and *great* perplexity about their *great* seal. Here he is—the veritable old Governor—with his three-cornered beaver on his head and in the graceful costume of his day. Near him stands one of the aborigines, distinguished as to costume, like "*lucus a non lucendo,*" by a total absence of it. With him the ancient Procurator, there being no common language at their command, is interchanging by dumb show sentiments that, as material for future history, it would be beyond all price to possess, but which, alas ! like the lost *Fleiad*, are lost to this world forever. Environing these in most felicitous taste, indicating the conception of some great genius, we have a wreath formed of four dolphins gracefully linked together, and disporting, not on the sea, but in the air.

Now, here would arise the question :—Can we trace on the face of the impression features that point to an identity between the seal used and what we may infer from the evidence to be that other seal, which, as is asserted, ought to have

been used? This, assuming that we have any evidence of a new seal of which we know nothing, would on the whole have to be answered in the affirmative. Assuming even that there exists a new seal, not identical with the old, the question would be:—Do we find in this impression “*Or*, on a *Fesse wavy-azure* between three thistles *proper*, a salmon *naïant argent*?”

In this language, to interpret which we derive no aid from the black letter, with which we are, or are supposed to be, familiar, there is, of course, much to puzzle the uninitiated. “*Or*,” “*Argent*” and “*Proper*” may be at once dismissed from consideration, inasmuch as the seal was incapable of transmitting *colors*, which alone could represent those. Inspecting the impression my eye at once fixed with almost *avinine* eagerness on the thistle, which is unmistakably there, and being enough of an agriculturist to know that one of that prolific family is seldom found alone, I searched further, confidently expecting to find the remaining two of the sought for triad; but in vain, probably from the obscure and undefined character of the impression in a portion of it. That subject of enquiry, therefore, I was obliged to leave undecided. In the picture before us we have what may be the one or the other of two things—either the canoe of the Mic Mac or a lordly salmon swimming in a silver field. Interposed in the picture, however, between *Governor Cornwallis* with the Mic Mac Sachem, and the distant forest, seen on the hill of what is now Dartmouth, we have unquestionably the sought for wavy azure, in a glimpse presented of the “wavy azure,” such as heraldry never conceived, of our greatest pride, the harbor of Chebueto, that magnificent bay on the bosom of which rode, more than a century ago, *Admiral Saunders’* fleet, bearing onward to Louisburg conquering British arms, destined to terminate, as they did terminate, the sway of the French in what is now British North America. Here one might ask; Can it be that a metallic souvenir, possessed by Nova Scotia, of all this, so full of interest, on the old seal, has not been reproduced on that new seal which we have not yet seen? Where is the “*monumentum ære perennius*” to be found, if not on the unseen seal, that shall restore it, and transmit to

posterity what the old seal so eloquently and picturesquely represents ? When I see the fact verified on the new seal placed before my eyes, but not till then, shall I cease to believe in the impossibility of a result so deeply to be deprecated.

My careful examination of the impression, and the discovered aesthetics of its original, which I have very inadequately described, have removed from my mind its first impression of surprise, at the hesitation of General Doyle's Council to accept the new seal. That surprise has been succeeded by unqualified admiration of the patriotic cabinet, who appear to have clung with enthusiasm,—constitutionally or not, I am not called on to determine—to the old seal—the time honored symbol of country, associated with the hallowed memory of that glory which had just departed from the "*haud inamabile regnum*" that once owned the Vice-regal sway of *Cornwallis*.

I cannot conclude without offering a word of consolation and cheer to drooping spirits, and I am told there are such within our borders. Of this one thing the provincial lieges may be assured. They may banish all doubts, if they have felt them, as to the legal validity of rights now claimed by them under the Great Seal of Nova Scotia. Above all, let not dismay disturb the repose of connubial hearths. Every couple of heaven-made matches, who have knelt at Hymen's altar, since the auspicious nuptials of the Provinces were consummated, may safely indulge in mutual congratulations, and celebrate their silver and their golden weddings ; and may, notwithstanding doubts and terrors inspired by the Great Seal question, in common with the sister Provinces of the Dominion, that were once many, but are now "one flesh," exclaim, in the words of the Roman bard—aye, even if the very seal in question had sealed their unions :—

"*Felices ter et amplius,
Quos irrupta tenet copula.*"

DESBARRES, J., concurred in the elaborate and exhaustive opinion of the learned Chief Justice, just delivered, which went into the whole subject with a great deal of care and remarkable skill. He concurred in the views of the Chief Justice on both points respecting the Provincial Statutes, and

also in his view with regard to the seal, which became the proper seal of the Province in December, 1869. He thought the new seal was the seal to be affixed to all documents requiring the Great Seal.

MCDONALD, J., concurred in the opinion of the learned Chief Justice.

JAMES, J. :—The task which I have now to perform is, I need hardly say, one which I would gladly have avoided. It is to give my opinion in an important case—a case, as it now stands, virtually decided by this Honorable Court, of astounding importance,—in opposition to that of four Judges—all of them my seniors, and three of venerable age and experience, extending over decades of years—and I may well presume, when I consider their ability, learning and experience, that I am wrong in the opinion I am now to deliver. Nevertheless I have a clear and well defined opinion on this question, which has been forming and ripening during all the discussions which have taken place. It was but on Saturday afternoon that I became aware, to my great disappointment, that there would be a difference of opinion on the Bench, or that I should occupy the position of being alone in my opinion. Perhaps it would have been better had I accepted the offer so kindly made to me by my learned brethren, of a postponement of the decision, in order to enable me to prepare an opinion which would do justice to my own convictions. I have had but a few hours to write my judgment, and therefore I have not been able to attain that end, but I may perhaps have succeeded in showing that there is at least some reason for the results at which I have arrived.

And, first, as to the question of *Mr. Ritchie's* precedence, independently of its relation to the seal. The validity of the precedence granted to *Mr. LeNoir* and others, against which he contends, depends on the validity, effect and construction of two acts of the Local Parliament which have been already fully referred to. Their validity, or rather their effect in transferring the exercise of the Royal Prerogative, was questioned at the argument, but it has been sustained by the opinions of the learned Judges who have preceded me, in which

I am happy to concur, they having already decided that these acts are not *ultra vires*, but that they confer upon, or at least confirm in, the Lieutenant Governor the right to exercise the Prerogative of the Crown in the appointment of Queen's Counsel, and in regulating the precedence of the Bar of this Province. I do not consider the first of these acts at all derogating from or transferring the Queen's Prerogative. As the sole fountain of honor throughout her vast Dominions, whether on the plains of Hindostan or in the Province of Nova Scotia, this Prerogative is still vested in Her. But by assenting through her representative, the Governor General of this Dominion, to this act, she has rendered legal the exercise of that Prerogative by her representative in this Province, without her more immediate intervention, either personally or by her officers. This act I hold not to take away her prerogative, but merely to place the exercise of it in the hands of the Lieut. Governor. It is still her royal prerogative, by whomsoever it may be legally exercised.

But I think it is obvious from both of these acts that in transferring the exercise of her prerogative she intended to do so, and has done so, in a plenary manner. The language of the acts is as strong, clear, and definite as is possible. They profess to give to the Lieut. Governor not only the unlimited power of appointing Queen's Counsel, but the unlimited power of regulating the Bar, by giving precedence to such of its members as he shall see fit. I need not enquire whether Her Majesty, by assenting to the first of these acts, gave up all power of interference with the appointment of Queen's Counsel. Clearly there is nothing on the face of it to restrain the Imperial or Dominion Governments from exercising that power, and there is nothing in the exercise of that power by either of these bodies necessarily conflicting with the power of appointment conferred on the Lieut. Governor. But when we come to the question of precedence conferred by the second act, it is obvious that it is a power which could not be exercised by more than one of these bodies, without the grossest confusion.

It would be ridiculous to suppose that either Her Majesty or the Legislature intended that a scale of precedence should

be adopted by the Lieut. Governor to-day, to be overruled by another framed in Ottawa to-morrow, and that reversed the next day by a fresh gubernatorial act in Nova Scotia. Such a state of affairs would be a patent absurdity, which could not be thought of by anybody, and therefore I am clearly of opinion that this act confers on the Lieut. Governor the exclusive right of regulating the precedence of Counsel in this Province.

But to what extent? Can the Lieutenant-Governor only regulate the precedence *inter se* of the Queen's Counsel appointed under that act? or has he all the power which before the act was, and still is, vested in the Crown?

I will further observe that the second of these acts which I have now under consideration is quite general in its language. Its title is 'An Act to regulate the precedence of the Bar in Nova Scotia,' and its preamble is as follows:—"Whereas the regulation of the Bar in Nova Scotia is vested in the Provincial Legislature, and it is expedient for the orderly conduct of business before the Provincial Courts, that provision should be made for the order of precedence of the members of the Bar in such Courts."

There is not a word in the title or preamble indicating any intention to limit the operation of the act; nor is there a word in any part of the act to limit or restrain it, except the express limitation in the 1st, 2nd and 3rd sub-sections, giving precedence to the Attorney-General of the Dominion, the Attorney-General of Nova Scotia, and the Queen's Counsel appointed before July 1, 1867. All other Queen's Counsel and other members of the Bar, by words as express as the English language can supply, are entitled to such precedence as the Lieutenant-Governor shall, from time to time, see fit to grant to them, and no more.

But it is objected that this act, express as is its language, can only refer to such gentlemen as had not received the honorary distinction of the silk, until after the passing of the act; and that to give a larger construction would be to give it an *ex post facto* operation, so as to interfere with vested rights. If it were so, undoubtedly this would be a valid, if not conclusive, argument against giving the act the more ex-

tended operation which is imported by its clear, express language. But is it the fact that the position of a Queen's Counsel is such a vested right and interest that it cannot be taken away without moral wrong or injustice? If it be, then the precedence of every senior member of the Bar is unjustly interfered with when one of its junior members is elevated by his appointment as Queen's Counsel over his seniors at the bar. Do we not know—do I need to refer to the abundant authorities cited on the argument, and numerous others, to shew, that it is the constant practice for the Crown in England, not only to confer these honorary distinctions on junior members of the Bar, by appointing them over their seniors, but to select a particular Barrister or junior Queen's Counsel and give him rank over Queen's Counsel of long standing, with no better reason than the Sovereign's will and pleasure. Is this then, which is the ordinary usage and practice of the Crown, an immorality? Is it such an act of wrong and injustice that we must presume, rather than permit it, that an Act of Parliament must be held not to mean what it expressly and positively declares? If it be, then our Sovereign Lady the Queen is in the constant practice of committing the most atrocious acts of injustice, an idea so repugnant that it appears to me to render my argument conclusive. And not only so, but if this be immoral, then the whole Act from beginning to end is based on a corrupt and dishonest principle, for its whole scope and essence is to enable the Lieutenant-Governor to do the very thing in all time to come that is now complained of as an act of injustice.

It is true that the Serjeants of the Common Pleas, in 1840, made a gallant stand for their privileges, when, by an order under the Royal Sign Manual, their rights of exclusive audience were interfered with, and barristers from the other courts permitted to plead in that court with precedence according to their rank and seniority. The position which they assumed was that the court itself, as well as the rights of all its officers, were of common law origin and were fixed by immemorial usage and prescription—that the Serjeants were a part of the court itself, and had been so from time immemorial, and that the Crown by a Royal Mandate could no more

abrogate the office of Serjeant or control its privileges than it could take away the Court itself or direct that the Serjeants should be the judges. And it was contended by *Sir William Follet* and *Mr. Austin* on behalf of the Serjeants, in arguments of the highest learning and most consummate ability, which I have read with very great pleasure, not, as in this case, that their rights could not be taken away by acts of Parliament, but that, being fixed by the common law, they could not be taken away by any lesser authority.

But the case of the Serjeants is an exception. In all the other courts the power of the crown to regulate the precedence of the Bar is unlimited. No doubt if this power were exercised in an arbitrary or capricious manner, it would be the subject of grave complaint and dissatisfaction. But such a thing as a Queen's Counsel in England contending that he had a vested right in his precedence, or that to place a junior over his head was *per se* an injustice to him, would be, I venture to say, an unheard of proceeding. I therefore hold, with very great deference to the learned and able Judges who have given their opinions, and who are in all probability in the right, that *Mr. Ritchie* had no vested interest in his precedence as Q. C., any more than any of his seniors may have had when he, in compliment to his great ability and high standing at the Bar, was very properly elevated over their heads to the Inner Bar,—and as I have already endeavored to maintain the position that Her Majesty intended by that Act to transfer to the Lieutenant-Governor all her prerogative in relation to precedence at the Bar not therein specially excepted, it follows, if I am right in these premises, that this Act having transferred no power which Her Majesty in person, or by her advisers, might not justly and legally have exercised, had the Act not passed, no wrong will be done to *Mr. Ritchie* in holding that the Act is not retrospective in any unjust or improper sense, and therefore ought to be construed according to its plain intent and meaning as expressed by its language.

But then it is contended that the power has not been effectively exercised because the Great Seal has not been affixed to the patent as required by the Act—the seal actually affixed to

it not being the Great Seal, but one which was formerly in use, and which had then been abrogated. It is sworn on behalf of *Mr. Ritchie*, that the seal to this patent is not the Great Seal, and in support of his position he produces the *Canada Gazette* of 20th November, 1869, containing:

1. A despatch from the Duke of Buckingham, Colonial Secretary, to Viscount Monck, the Governor General, dated 14th October, 1868, enclosing,

2. Her Majesty's Warrant under the sign manual assigning armorial bearings to the Dominion and the Provinces of Quebec, Ontario, Nova Scotia and New Brunswick.

3. A despatch from Earl Granville, Colonial Secretary, dated 8th May, 1869, enclosing Seals for the Dominion and these four Provinces—and also,

4. A second Warrant dated May 7th, 1869, under the Sign Manual commanding that these seals should be used and the old seals returned to the Colonial Office to be defaced.

5. A Minute of the Governor General in Council as follows:

"GOVERNMENT HOUSE, OTTAWA,
Tuesday, 16th November, 1869.

Present—His Excellency the Governor General in Council. It is ordered that the Great Seal transmitted by the Right Honorable the Secretary of State for the Colonies, with Her Majesty's Warrant, dated the 7th day of May, 1869, shall be used as the Great Seal of the Dominion of Canada for the sealing of all things whatsoever which shall pass the Great Seal of the said Dominion, on, from and after the date of the present order.

WM. H. LEE,
Clerk of Privy Council."

The Minute of Council was immediately published in the *Canada Gazette*. We have here a solemn act of adoption and a time set for the operation of the new seal and full publicity given. There are several things to be noticed in connection with this part of the transaction which are very important and significant.

First:—The Seals were sent out in May and not adopted

till November. The Minute of Council imports that the Seal formerly in use for the Dominion had continued to be in use for several months after the arrival of the new Seal with the Warrant enjoining its use and the return of the old Seal. Is it not obvious that, if the contention of Counsel for the applicant be correct, that the old Seal of Nova Scotia became invalid and the new Seal took effect on receipt of the new Seal and Queen's Warrant at Halifax, then the Governor General of the Dominion for several months used an illegal Great Seal for giving authority to the public acts of the General Government. So this question, if that view be correct, assumes immense importance. It becomes no longer a provincial but a national question. How many grants were issued, how many loans contracted in the English money market, how many Lieut.-Governors and how many Judges were appointed under that illegal Seal, it would be curious, and if I am wrong must become important, to enquire. I am happy to say, however, that I am not aware that any of our Lieutenant-Governors or important judicial officers were appointed during that period. But a month or two after the new Seal was adopted there were two appointments to the Bench. Had these appointments been made a few weeks sooner, the consequences would have been still more serious than they are.

The second circumstance I will note respecting this Minute of Council is that the authorities of the Dominion evidently considered the old Seal the legal and right Seal until the new Seal should be formally installed in office by a Government Act. It is a consolation to me in my present isolated position to know that I have some countenance for my opinion from a quarter where we might expect to find an acquaintance with constitutional law and usage.

And thirdly it is to be noted that while the Minute of Council adopts the new Dominion Great Seal and fixes a day for its coming into operation, it performs no such office for the Provincial Seals, which it does not even mention. It is obvious that the Governor-General in Council purposely left this important duty to be performed by the Lieutenant-Governor.

I need not pursue the history of the matter as it appears by the public despatches submitted to us, further than to say that

immediately after the above Minute of Council and proclamation the new Seal was sent to and received by *General Doyle* at Halifax, that the despatches and Queen's Warrant were submitted by him to his Council, that they did not adopt the new Seal, but sought the Royal sanction to continue to use the old one, which they did not obtain, the correspondence appearing to have been dropped, and that in fact it never was adopted or used. It also appeared by *Mr. Ritchie's* affidavit, which has not been contradicted, that it was in the Provincial Secretary's office at Halifax, when he made his affidavit in December last.

In opposition to *Mr. Ritchie's* case affidavits were made by the Provincial Secretary and his Deputy that in their belief the Seal to the Patent was the Great Seal of the Province, used and recognized as such, and that they knew of no other Great Seal having been accepted, adopted or used.

There is no doubt that the gentlemen making those affidavits on both sides have stated what they believed to be true. Which of them is correct in point of fact is a question of law which the Court have to-day to decide.

* I ought to observe, however, that the Queen's Warrant was sent by *Mr. Howe*, Secretary of State for the Provinces, to *Genl. Doyle* in a despatch dated 24th November, 1869, containing an instruction to him (not to *use* the new Seal but) to *take measures for its adoption* as the Great Seal. The receipt of the despatch and of the new seal is acknowledged by *General Doyle* in a despatch to *Mr. Howe*, dated 10th December, 1869, but it does not mention the date of receipt of either *Mr. Howe's* despatch or of the Seal. These may have arrived at any time within a fortnight previously.

I have read all the papers and correspondence relating to this matter which have been furnished to us, and also the correspondence published in the Sessional Papers of the House of Commons for 1873, but it is not necessary for my argument to refer to them more than I have already done. I have also carefully examined all the authorities cited.

I find the ancient usage in relation to the adoption of the new Seal and the destruction of the old, thus succinctly stated in *SIR MATTHEW HALE's Pleas of the Crown*, p. 174 :—

" Antiently, when there was any change made of the Great Seal, there was not only a memorandum made thereof *in dorso clausorum cancellariæ*, (a public record of the Lord Chancellor's Court), and a public notification thereof in the Court of Chancery, but public proclamation was made thereof."

And on page 176, after stating that the Great Seal of the last King continues until another be made and delivered to the Lord Keeper by the King, the same eminent authority gives an account of the actual proceeding as follows :—

" The King by his proclamation bearing *teste 3 Oct. Anno* 1, directed to all the Chief Sheriffs of England, signifying that he had made a new Great Seal and that it was to take place from the fourth day of that month of October, sends them the impression of the new Seal in wax, commands them to publish it, and that after the fourth day of October they should give faith to it, and receive no writs but under the new seal after that day."

" The fourth of October being Sunday, the Bishop of Ely, Chancellor, produceth the new Seal, declares the King's pleasure that it should be from thenceforth used. The Monday after the old seal is broken, *præcipiente rege*, and the pieces delivered to the Spigurnel," (an officer of the Court.) And on page 177—" Till a new great seal be made, the old seal, being delivered to the keeper, and used and employed as the Great Seal, is the Great Seal of England."

We have here the ancient practice—a practice so ancient as to have all the force of law—of inaugurating the Great Seal by a public specific act, entered in a public record, destroying the old one and making public proclamation of the new, fixing a date for it to assume legal efficacy. The usage is so old that there is no record of its commencement, and it has continued in force through all the ages to the present day, and we find it followed, and I have no doubt rightly followed, by the Governor-General of the Dominion in Council. Nay, I have little doubt that, if the records of the Executive Council of the Province were searched, it would be found to have been the invariable practice to make a record of the adoption of the new Seal and the return of the old one to the Colonial Office, and also to make a public proclamation of the transac-

tion. It is owing to the strict observance of this custom that no such difficulty appears ever before to have arisen in England or any of her Colonies.

I have not space or opportunity to extract from the books, as I would like to do, many curious and interesting items respecting the history of the Great Seal—most of which are to be found in *Campbell's Lives of the Chancellors*. Suffice it to say that the practice, as laid down by HALE, is the public and immemorial usage of the realm. It is as well established as the ceremony of a public coronation of the Sovereign. Nay, far more so, for Sovereigns have often reigned for years, and sometimes through their whole lives, without a public coronation, but there is no single instance to be found in the books all the way back through centuries of a Great Seal being used or recognized without first being inaugurated by public ceremonies, by a formal public record and public proclamation.

Are these simple ceremonies, this record and this proclamation, then idle forms, more honored in the breach than in the observance? What are we now told, and told most truly? Nothing less than this, that every grant of Crown Land made since 1869; during which period hundreds of thousands of acres of valuable timber lands have, for pecuniary considerations, been granted by Her Majesty to her subjects, are null and void, that public officers may have been appointed and Legislatures convened on what after all turns out to be an illegal seal? Could this have happened in England? Could a doubt have arisen there as to which of the two seals was the Great Seal? And yet it is not only contended that many of the most important public acts of our own Government for eight years,—but it must follow as a necessary corollary, that many of the most important acts of the Dominion Government for several months—are invalid, because a wrong seal has been used! But if we hold, as I feel myself constrained—perhaps erroneously, but if so, certainly not for want of appreciation of the importance of the subject, and certainly not from any want of industry or care on my part—to hold that the constitutional usages of the Imperial Government in relation to the Great Seal are a part of the common law, and as such

binding on Her Majesty's officers, and in full force for the protection of her subjects in their rights and privileges—then the new Seal could not become operative, nor the old Seal cease to be the Great Seal of the Province, until a solemn public act of her representative—either the Governor-General, or the Lieutenant-Governor, who is Her Majesty's Chancellor for this Province—had taken place, a day been appointed for the new Seal to come into operation, and the fact proclaimed, as was done at Ottawa for the Dominion, in the *Royal Gazette* of the Province.

Of the transactions thus sanctioned by national usage, not the least important is the identification of the precise time at which the new Seal comes into operation. Any doubt as to which of the two Seals, the old or the new, were the true seal, though it lasted but for a single day, would in a great nation like England be a grave national misfortune, and therefore we find that in every instance the public record of the transaction which is endorsed upon the close rolls specifies the exact day. But in some instances it goes still further and specifies not only the day, but the hour. Here is an example from 2 *Campbell's Lives of the Chancellors*, p. 34, (note):

"*Rotula clausorum, 1 Edward VI., Mar., 14; Quo die circa horam primam post meridiem prefatus Dominus Rex Sigillum suum primum apud Palm suum, &c., &c.*"

From which it appears that on the 14th day of March, in the first year of Edward VI, (1547) the New Seal was delivered by the Duke of Somerset, Lord Protector, in presence of the infant King, then about six years of age, to the Lord Keeper, and a record made of the transaction. Yet this solemn ceremony, so absolutely necessary, so uniformly observed, and so carefully chronicled in England and in this Dominion, is held to be altogether unnecessary here.

It is said that the Royal Warrant was sent out containing Her Majesty's command that the New Seal should be used, and the old one returned to be defaced.

But is this the first Royal Warrant of the kind? I have no doubt whatever that this warrant, or rather one similar to it, precedes the inauguration of every public seal in England and the colonies. These things are done in England upon a regu-

lar system and order which have continued with only necessary alterations from age to age ; and it is probable enough that delays have often before taken place in the fulfilment of their requirements (just as delays took place both at Ottawa and at Halifax), which have not been handed down to us, for the simple reason that they were of no importance whatever until the appropriate inauguration of the new Seal took place in such a manner that all the world could know it ; and, until the old Seal was deposed from its high position by its absolute destruction or banishment, so that, like Midhat Pasha, it could no longer be dangerous, the latter alone was the Great Seal.

It is a well-known French Proverb ; *Le Roi est mort ! Vive Le Roi !* and as it is with the King, so it is with the Great Symbol of his authority, his Royal Seal,—the new seal can no more have credence or authority until the old one is disposed of, than the new king can reign in the life of his predecessor. There cannot be two kings nor two seals—nor can there be an interregnum between the old and the new in either case. The Common Law by immemorial usage provides that at the death of one king—at the very moment of his death—his successor begins to reign ; and the same Common Law by usage as immemorial, so far as can be ascertained by the public records or from history, provides that the Royal Seal shall exist until its successor is made, is delivered to the first officer of the Crown for safe keeping, is entered of public record, and made public. The old one then ceases to operate by its immediate destruction. The two transactions are simultaneous.

But how can this warrant which we have before us supply the place of these constitutional requirements ? In the first place it fixes no time for the important transaction of changing the seals. We are told that as soon as it arrived the new Seal came into operation. But are we to suppose that so important a transaction, that is, if this warrant be the criterion, would be left by Her Majesty's Secretary for the Colonies to so uncertain a time as the arrival of the Seal in this Province ? Suppose the Lieut.-Governor had been absent or ill, or that he had suddenly died, and nothing could be done until his successor was appointed. Surely Her Majesty's Imperial Ministers would never have left room for a question as to what was the

Great Seal of the Province by any loose and irregular proceeding. The most significant answer to the suggestion is that which actually occurred. We have no record of the day of its arrival here, nor any hint given us that such record exists. It may have been on any day between the 27th November and the 20th December when the receipt was acknowledged. Which was the Great Seal of the Province during that interval? I asked this question of the learned Queen's Counsel who opened the case on the first discussion of it, and he did not and could not answer it, except by stating that the Seal came into operation on its arrival—which is a *petitio principii*. Yet this is a most important question, as during that fortnight a Legislature might have been convened without any means existing to decide whether it had been called under the authority of an improper Seal. My answer to the question avoids all difficulty.

But let us look at the warrant itself—and the first thing that strikes us is that, not only does it not appoint a day for the new Seal to go into operation, but it does not even say that it is to be adopted or used immediately. Its commands have in fact never been literally disobeyed. In my opinion, if the Lieutenant-Governor should take the appropriate means to inaugurate the new Seal to-morrow, Her Majesty's command will have been obeyed. Not certainly with any commendable alacrity, and not within a reasonable time, but as there is no limit in the Warrant itself of the day or year in which it was to be obeyed, I think it probable that Her Majesty intended to leave it to some extent to the convenience and discretion of the Local Government: If the law be as I contend it at least ought to be, Her Majesty's Ministers, knowing that until properly inaugurated, the Seal was but a bit of harmless brass, and that there need be no haste about the matter, very properly left the date to be fixed and the Seal to be adopted, &c., in the usual constitutional manner at such time as the Lieutenant-Governor should see fit—the result has been that it was not done at all.

This may have been very improper on the part of *General Doyle* and his advisers. Her Majesty's commands should certainly have been obeyed in a reasonable time and in the con-

stitutional manner. The objections made to the new Seal by the Minute in Council were childish enough in all conscience. I do not believe for instance that the people of this Province had any such violent attachment for their ancient Seal, which after all was not more ancient than the accession of Her present Majesty—and I have no idea that they would have broken their hearts at the substitution of the new seal.

Those who committed the offence might have, and perhaps ought to have, received appropriate punishment either from an angry Sovereign or an indignant people—or they might have been compelled by any gentleman of the Long Robe applying to this Court for a writ of mandamus to take the necessary steps to adopt the new Seal. Unfortunately we knew nothing about it and nothing was done. But the people were innocent, and it is hard that they should be punished for the neglect of Her Majesty's officers by the invalidation of their Legislature and the loss of their lands. If I am right in holding that the usages I have so often referred to are a part of the Common Law of England, then they are the public rights which our fathers brought with them to this Province, and as such they are our inheritance. If they are as such accepted and sanctioned by the courts of law, as I think they ought to be, then they will operate effectually for the protection of our public and private rights, and our Legislature, our laws, our grants, for the last eight years, will not be swept away because Her Majesty's servants were guilty of neglect and mismanagement, and used one bit of brass instead of another as the Great Seal. If I am right, and am held to be right, no injustice will be done, no longer need any excitement or alarm exist. The Imperial Parliament need not be applied to to do what, I fear, they will not do—that is, to pass an *ex post facto* act (not to give one or two gentlemen precedence at the Bar over two or three others—that is contended to be enough to render it impossible that the Legislature can have intended it), but to take away from hundreds of individuals their legal right to lands which they enjoy, merely because the rightful owners have lost their title by an accidental neglect about the Great Seal. I doubt very much whether the Imperial Parliament will pass such an act. I even hope it may still not be

necessary to ask for it; but if asked for I hope it will not be refused.

I am of opinion that this patent is valid, being sealed with that which is the Great Seal of the Province, authenticated by the signature of its lawful keeper, the Lieut. Governor and Chancellor of the Province and by his principal Secretary, and, with great hesitation, arising only, however, from a sense of the immense preponderance of experience, learning and ability with which I have in this argument to contend—that the application of *Mr. Ritchie* for the precedence which he claims should be refused.

IN RE HOSPITAL FOR INSANE.

A. McMinn was mortgagor of a lot of land. After his death the mortgage was foreclosed, and his widow, Mrs. McMinn, bought the lot, in December, 1842, for £206, the sum of £725 of this amount being advanced by her daughter, Mrs. A. Kean. Several small payments were made by Mrs. McMinn to Mrs. Kean, and in 1864, on part of the land being sold, £400 were paid over out of the proceeds of the sale to Mrs. Kean, who soon afterwards agreed with Mrs. McMinn that for the balance due, some £250 or more, she would take a small house on part of the land, with a small piece of land adjoining. Mrs. Kean went into possession of the house and land agreed upon in 1864, and remained in possession until 1872, when that land and a considerable portion of the balance of Mrs. McMinn's land were taken by the Government for public purposes.

Held, that out of the appraised value of the lands, paid into Court by the Government, Mrs. A. Kean was entitled to a sum equal to the balance due her at the time of the agreement in 1864.

This was an application to confirm a Master's report. Certain lands, formerly the property of Mrs. McMinn, were taken in 1872 by the Commissioner of Public Works for the Province of Nova Scotia for the Hospital for Insane. The land and improvements taken were appraised at \$4000, and, there being two claimants, that sum was paid into Court by the Provincial Government. Part of the money, \$1690, was afterwards drawn by one of the parties by consent. The claimants were, on the one side, Mr. and Mrs. Kearney, son-in-law and daughter of Mrs. McMinn, who claimed under an

agreement executed by Mrs. McMinn, whereby she agreed to convey her land to Mrs. Kearney for life, with remainder to Mrs. Kearney's children in fee; on the other side, Mrs. Ann Kean, a daughter of Mrs. McMinn by her first husband, who had advanced the greater part of the money with which the land had been purchased in 1842, and who claimed that for a balance due her in 1854, of some £253.18.2, a portion of the land, being a portion of that lot taken for the Hospital, with a cottage on it, was set off to her by Mrs. McMinn, and that she occupied the same till the land was taken by the Government in 1872.

The matter was referred to a Master, who took evidence and reported that Mrs. Ann Kean had no legal or equitable claim to the land or the money. On a motion being made at Chambers before Mr. Justice McDONALD to confirm the report, he directed that the cause be argued before the full Court.

On Saturday, February 17th, 1877, accordingly,

Wallace, for Mr. and Mrs. Kearney, applied to the Court to have the report confirmed.

Shannon, Q. C., showed cause.—Mrs. McMinn, having purchased the property largely with money belonging to Mrs. Kean, is to be held a trustee of the proceeds of the land for Mrs. Kean's benefit. Cites 2 *Story's Com. on Equity*, sec. 1255; *Hill on Trustees*, pp. 272, 146; *Story's Com. on Equity*, sec. 1217. The last authority shows that the Statute of Frauds does not apply to a case of this kind, and that parol evidence is admissible. 2 *Dart on Vendors and Purchasers*, 930; *Groves v. Groves*, 3 Young & Jervis, 170; 10 *Vesey*, 360; 1 *White & Tudor's L. C. in Equity*, *Dyer v. Dyer*. In 1854, or thereabouts, the Government required some of the land, and bought it and paid for it. Mrs. McMinn then paid over to Mrs. Kean £400, and at her request for a settlement of the balance, gave her a portion of the land in lieu of the money. Mrs. Kean was in actual possession of that land when the Government stepped in and bought, and the money was paid into Court. She is now willing to take the balance of money due her on the original loan.

Wallace, in reply.—There can be no resulting trust here. Such a trust must arise by an express and explicit agreement upon the payment of the money, pointing out the property. Where the advance of money is a loan, there can be no trust. Mrs. Kean's own statement, in her first affidavit, is that the land set off to her was two or three acres. That is too indefinite. In her second affidavit she says she fenced in the land. The part she fenced in was in reality only about one-fifth of an acre. Mrs. Kean's own evidence is that she loaned the money to Mrs. McMinn, and she does not even make it clear that it was loaned for the purchase of this land. The Master has decided this case as a jury, and his conclusions regarding the matters in evidence cannot be touched by this Court, unless it can be shown that any of his conclusions are without any basis of evidence, or are contrary to clear evidence. Mrs. Kean's evidence is shown to be worthless by the material contradictions in it. The writ is in evidence in which Mrs. Kean brought an action of ejectment for one acre, while she is claiming now for three acres.

Cites *Perry on Trusts*, secs. 77, 79. The only pretence that could be set up here is that there was a verbal agreement, partially carried out. *Perry on Trusts*, 124,-5,-6,-7,-9, 132. The money must be paid in the character of purchaser; where it is loaned no trust results. *Hill on Trustees*, 55, 56, 90, 153, 157, 169; *Daniell's Ch. Pr.*, 1248, 1298-9, 1300.

Shannon, Q. C.—The case forming the authority for the proposition that where the purchase money is loaned no trust results, *1 Eden*, 516, is overruled by *Hurd v. Pilley*, 4 L. R., Ch. A. 548. Cites 4 *Kent's Com.*, 344; *Gray v. Steel*, 2 Ves. & B., 308; 2 *Atk.*, 72.

MCDONALD, J., now (March 26th, 1877,) delivered the judgment of the Court:—

Andrew McMinn was the mortgagor of a lot of land situate at Darmouth, and after his death the mortgage was foreclosed, the land was sold and was purchased at the sale by his widow, *Mary McMinn*, for £905. On the 1st day of December, 1842, she received a deed of the land, signed by a Master in

Chancery. *Ann Kean* was her daughter by a former husband, and, about the time of the foreclosure, was the owner of two properties in Halifax, which, as appears by the evidence, *Mrs. McMin*n induced her to sell and to apply the proceeds towards paying the purchase money of the lot at Dartmouth. *Mrs. Kean*, (*Ann*) testifies that she paid for that purpose £725, under an agreement with *Mrs. McMin*n to return the money with interest, as soon as she was in a position to do so, and that subsequently, *Mrs. McMin*n sold a part of the land for the use of the Hospital for the Insane, and, out of the proceeds, paid her £400 on account of the money so advanced. She further testifies that, soon afterwards, it was agreed between them that she (*Mrs. Kean*) should accept, in lieu of the balance due her, a small house on a part of the farm, with a small piece of land adjoining it, which was pointed out at the time, and that, in pursuance of that agreement, she was put in possession of the house and lot, and so continued from that time, 1854, till 1872, when all, or the greater part of it, was taken under our statute by the Commissioner of Public Works for the use of the Hospital for the Insane, which was then being enlarged; and that such possession was uninterrupted, except by *Kearney* in 1872, pulling down her fences. *Mrs. Kearney* is the daughter of *Mrs. McMin*n by her second husband, and she and her husband claim the property under an agreement dated the 24th day of February, 1871, whereby *Mrs. McMin*n agreed to convey it to *Mrs. Kearney* for life, then to go to her (*Mrs. Kearney's*) children in fee simple, subject to a life interest in herself, *Mrs. McMin*n. *Mrs. Kean* testifies that on several occasions *Mrs. McMin*n promised to secure to her by deed the title to the house and lot agreed upon, but omitted to do so. Taking her evidence, corroborated as it is by that of *Mr. Johnston* and *Mr. Lenoir*, and by the account produced, I have no doubt whatever that what she says respecting the advance of the money is correct. When the land was appraised and the money was about being paid over by the Government, *Mrs. Kean* claimed that, having an equitable interest in the property, she ought to receive her share of the money, which claim was resisted by *Mr. and Mrs. Kearney*. By the second appraisal, the property taken by the Government was estimated

at \$4000, the land being estimated to be three and 3-10 acres at \$700, making \$2310, and other things allowed at \$1690. The \$4000 were paid into court, and afterwards, under an order signed by His Lordship, the Chief Justice, and by consent of *Mrs. Kean*, \$1690 were paid out to the *Kearneys*, leaving the \$2310, which represented the land, still in Court, to abide a decision as to the legal or equitable rights of the parties respectively. On the 18th day of January, 1875, the matter was referred to *H. C. D. Twining, Esq.*, a Master, to take evidence and report thereon, subject to such report being modified by the Court or a Judge. The Master reported that *Mr. and Mrs. Kearney* had the sole legal and equitable interest in the property. On motion to confirm that report before me at Chambers, I directed that the case should be argued before the full Court, which was done this term.

Much was said upon the question whether the payment of the money under the agreement proved by *Mrs. Kean* had originally created any trust in her favour or given any equitable claim against the land, which could now be recognized in deciding the respective rights of the parties, but I do not think that, under our Revised Statutes, chaps. 36 and 46, which give this Court jurisdiction to decide the matter, and in the light of the agreement of 1854, that question is very important. I am quite convinced that, notwithstanding the contradictory affidavits of *Mrs. McMin*n (an old, infirm woman) which destroy each other, *Mrs. Kean* advanced the money in the first instance, as she represents, and that the whole of that money had not been refunded to her in 1854; and I am equally convinced that, in consideration of that fact, the agreement then took place to which *Mrs. Kean* testifies, namely, that in lieu of the balance then due she was to have the house and land adjoining it, and that that agreement was so far acted upon that *Mrs. Kean* went into possession, made improvements on the land, and held it down to the time it was taken for the use of the Hospital. This agreement, and the subsequent action of the parties under it, I hold to be binding on both parties, and to have given *Mrs. Kean* as much equitable right as if she had actually advanced the money at the time of such agreement and taking possession, instead of the amount being recognized as due to her.

The parties made the agreement for a good consideration. It was acted upon from 1854 to 1872, and I do not think that we can ignore it now. If only the land occupied by *Mrs. Kean* under that agreement had been taken for the Asylum, I should hold that she would be entitled to the full amount of the appraised value of the whole, but it appears that other lands were taken as well as hers, all having been appraised together, and there is not any clear evidence to show the appraised value of what was taken from her. Her evidence shows that all or nearly all of hers was taken. She never claimed less than an acre, and it is not admitted that at any time she limited her claim to that quantity. She testified that what she was to have in lieu of her money was upwards of three acres; and but little over an acre would, at the appraised value, have been worth the balance of the principal money that was due her from *Mrs. McMinn* in 1854, when the agreement was made. At that time the account between them (without reference to the Statute of limitations, which appears not to have been taken advantage of) would stand thus: *Mrs. Kean* advanced £725.0.0. In her account she credits *Mrs. McMinn* with £5.9.4, £65.12.6, and £400.0.0, leaving a balance of £253.18.2, equal to \$1015.61.

No interest could fairly be charged, as both parties lived upon the farm, having the benefit of it mutually, from the time the money was advanced till 1854, since which time *Mrs. Kean* had her separate house and lot in lieu of her money. I enter into these figures not as the sole basis of adjustment now, but to assist me in forming a judgment by which, whether the case be regarded as a mere matter of account or as a matter of strict right, independently of accounts, under the facts proved, we can do substantial justice between the parties. *Mrs. Kean* states that the land given to her was upwards of three acres, that it was all or nearly all taken from her by the Commissioner of Public Works, and that it was the most valuable part of the land taken; but we have the fact that three and 3-10 acres were taken altogether. If *Mrs. Kean* knew the limits of her lot upon the ground, it would have been an easy matter to have pointed them out to a competent surveyor, who could testify as to the quantity of land em-

braced within them, and then the Court would be saved considerable difficulty. It is not unfair, however, to assume that in 1854 the parties themselves valued the lot of which *Mrs. Kean* was put in possession at the amount then due her, whatever quantity of land the lot contained, and she testified before the Master that it was all taken from her for the use of the Hospital.

It appears to me that, although she may have been, and possibly was, mistaken as to the quantity of land of which she took possession under the agreement of 1854, she could not be mistaken when she says that it was taken from her. In fact, she is not contradicted on that point, and if in 1854 the land, whether it was a half an acre or three, was really worth what she got it for, namely, the balance then due her, and if, as we may fairly assume, the appraisers did not value it lower than that in 1873, then *Mrs. Kean* would be entitled at the latter date to receive that sum from the Government. I think therefore that, the parties each bearing their own costs of argument and attendances before the Master, and the Master's fees being paid out of the funds, the sum of \$1015.61, with the bank interest thereon, should be paid to *Mrs. Kean* over her own receipt; and the balance of the \$2310.00 in Court, with the bank interest on such balance, should be paid on their joint receipt to *Mr. and Mrs. Kearney*, as soon as they, *Mr. and Mrs. Kearney*, shall have filed in Court the written consent of *Mrs. McMinn* to hand the money to them.



EATON v. WRIGHT ET AL.

Plaintiff was lessee to defendant, E. W., who, being in embarrassed circumstances, on the 29th August, 1873, assigned the rents to J. W. and A. R. W., to whom he was indebted in the sum of \$800, as security for the debt. Under the assignment plaintiff made three payments of rent to J. W., after which E. W. asserted a claim to the rents, and plaintiff paid him \$100, one month's rent, on the 1st of September, 1874, taking from E. W. and the other defendant, N. McD., a guarantee of indemnity against any claim from J. W. At this time plaintiff had a private account with J. W., who was in his debt, and on the 3rd of the same month he permitted J. W. to deduct from the amount due him (plaintiff) \$100, taking a receipt from him for a month's rent, up to the 31st of the previous month: plaintiff then sued E. W. and N. McD. on their guarantee of indemnity. On the trial plaintiff admitted that he knew the matter was in dispute when he allowed J. W. to deduct the \$100, and that he knew J. W. had said he had no claim on E. W.

Held, that plaintiff should not have allowed J. W. to deduct from plaintiff's account a debt due, if at all, to J. W. and A. R. W., that the liability to J. W. and A. R. W. was not so satisfactorily shown as to make defendants liable, and that the non-suit directed by the Judge who tried the cause must be sustained.

This was a rule *nisi* to set aside a non-suit in an action on a warranty or guarantee of indemnity. The facts are outlined in the head-note above, and are fully set out in the judgment delivered by Mr. Justice SMITH. The cause was argued during the term of 1876-7.

Eaton, in support of the rule.—A letter of license to Woodill to collect the rents was improperly rejected.

Wright and McDougall approach Eaton, who is liable to Woodill, and induce him to pay money to Wright, which is passed over to McDougall. There is consideration.

The claim of Woodill was a legal claim, and as such, among those guaranteed against. The plea denies that Woodill had any claim. We tendered evidence to show the state of accounts between Wright and Woodill, to show that Woodill as assignee was entitled to \$100, and that it was a valid, legal claim. The evidence was rejected.

The letter of license was signed by Wright, Woodill, Wier and McDougall, and others. It was rejected as irrelevant and as unproved as to the majority of the professed signatures. We say it ought to have been received. It was put in to show that Woodill's claim was a valid one.

Eaton, before he allowed Woodill to stop this money, told Wright that Woodill was bound to keep the money out. Wright said, keep the money on account.

As to want of notice to guarantors, cites *3 B. & Ad. 408*.

The decree of the Court of Equity, showing that Wright got the benefit in a suit between him and Woodill of this very \$100, was rejected. Woodill was compelled to give Wright credit for the hundred dollars.

Ritchie, Q. C., contra—We have nothing to do with the letter of license. Woodill did not claim the money under the letter of license. It was under the assignment of the lease to him and Wier that he demanded it. True, he says in his letter that he claims under the letter of license, but first, the letter is not evidence, and secondly, that account of the matter is not sustained by his testimony.

Eaton says there was no consideration between McDougall and him, and in his cross-examination he says he thinks he paid the \$100 to Wright eight or ten days before the guarantee, and afterwards he fixes the date August 22, eight or ten days before the guarantee. *Addison on Contracts*, 5; *DeColyar on Guarantees*, 25 and 32.

The plea of non-assignment puts the consideration in issue. *Roscoe, N. P.*, 459.

McDougall is nothing but a surety under the evidence. The words *warrant* and *defend* are entirely different from the words *guarantee* and *promise*. Eaton could not pay the money voluntarily, and then come upon us under the warrant. We should have had notice and an opportunity to come in and defend. *Washburne*, 475; *Parsons on Contracts*, 490; *DeColyar*, 1. The payment to Woodill was made three days after the guarantee given. He had no right to pay it to Woodill, and a suit could have been successfully defended. He allowed Woodill to stop it from moneys due him, which he could have resisted, as the debt was due, if at all, to both Woodill and Wier. Woodill alone had no right to claim it, as the assignment was to Woodill and Wier.

The assignment of the lease is not absolute but conditional, and there was no right to collect rents at all until breach, of which there is no proof. The plaintiff says he knew Woodill had said he had no claim on Wright. There is no evidence as to the state of accounts between Wright and Woodill, and

nothing in the plea to raise such an issue. The decree would not conclude McDougall, as he was not a party to the suit.

The letter of license was just an afterthought of Counsel. The claim was made under the assignment. The signatures are not proved.

The suit, the decree in which plaintiff endeavored to put in evidence, was brought before the money was paid.

There is no evidence on the common counts to fix McDougall.

Thompson, in reply.—In the Equity suit Wright claimed a redemption of the lease. The assignment of the lease was a mortgage of it. Wright claims in the bill that the money due on the account for which the assignment was given, and that the dividends due the creditors mentioned in the letter of license, had been paid. The defendants were required to file particulars, and in those the \$100 is included. Those particulars and the decree were subsequent to the payment of this money, and that is the answer to the contention that the Equity suit was brought before the payment of the money.

The letter of license should have been received, both because Woodill claimed under it in his letter to Eaton, and because referred to in the adjudication embodied in the decree.

There was evidence sufficient to go to a jury as to the time the guarantee was given, and the consideration proved. It would be no objection that the consideration was a past consideration. That would at best be a defence, not for Wright, but only for McDougall. We should not on that ground be non-suited as to Wright.

Under the letter of license Woodill had a right to set off his own debt against the rent. They apply to him as a creditor as well as a trustee.

As to the objection that the state of accounts between Wright and Woodill was not in issue, that was relevant to the question whether the claim we paid was a valid one. The only consequence of our not giving him notice and opportunity to defend was that we took the responsibility of its being valid, which we ought to have been allowed to show.

The decree was conclusive as to McDougall, because he was surety. 1 *Taylor on Ev.*, 640; *Broom's L. M.*, 334.

We should recover for money had and received against both defendants, but certainly against Wright.

SMITH, J., now (March 26th, 1877,) delivered the judgment of the Court:—

This action is brought to recover from the defendants \$100, which plaintiff paid to them under a written undertaking that they would warrant and defend him for any claims for the same on the part of one *John Woodill*.

There are two counts in plaintiff's declaration, essentially similar, with the exception that in one the undertaking of the defendants is set out as "to indemnify and save harmless," and in the other "to warrant and defend."

The defendant pleaded several pleas: denying the contract as set out; the liability of the defendants under the same for the money withheld by *Woodill*; and the fifth plea raises the, as it appears to me, important issue, to be substantiated by plaintiff, that is: whether at the time when the money was so retained and charged against plaintiff in his private account, there was due from him to *Woodill* on account of the rent of the *Right Market* the said sum of \$100.

The facts of the case, as they appear from the learned Judge's minutes, are simply these: In April, 1873, *Ephraim Wright*, one of the defendants, was the proprietor of a certain messuage dwelling house and premises in the city of Halifax, known as the *Right Market*, and on the 15th of said month he leased the same to the plaintiff for a period of three years from the first of the following May, at a yearly rental of \$1200. On the 29th of August following, the plaintiff, being indebted to the said *Woodill* and one *A. R. Wier* in the sum of \$800, assigned over to them as security the said indenture of lease, with a proviso that if the said debt be paid "as above specified," the transfer was to be void. What are the stipulations or the time of payment which the words "above specified" embrace do not appear from the extract furnished on the argument.

Under this assignment plaintiff made three payments of rent to *Woodill*. It would then seem that the defendant, *Wright*, asserted a claim to receive the rent, and that the

plaintiff, being aware of the matter being in dispute, took from the defendants the following document :

“ HALIFAX, September 1, 1874.

“ We hereby agree to warrant and defend Mr. Watson Eaton for any claims for rent on the Right Market and house from Mr. John Woodill ; also, to relieve Mr. George Stuart from paying any taxes for the year eighteen hundred and seventy-four on the Right Market.

“ EPHRAIM WRIGHT,

“ N. McDOUGALL.”

On the same day, contemporaneous with the delivery of this paper writing, and as part of the transaction, plaintiff paid these parties \$100 rent due for said Market, and took *Wright's* receipt for the same. At this time plaintiff had a private account with *Woodill*, who was in his debt, and on the third of September, two days after he had paid the defendants, he permitted *Woodill* to deduct from the amount due him, plaintiff, the \$100, and took a receipt as follows :

“ HALIFAX, September 3, 1874.

“ Received from Mr. Watson Eaton the sum of one hundred dollars, being one month's rent of the Right Market House and dwelling, up to 31st August, as per *transfer of lease made by Mr. Ephraim Wright*.

“ (Sgd.) JOHN WOODILL.”

At this time then *Woodill* was claiming the rent of the Market House, and deducted it from the plaintiff's claim, under the assignment of the lease, and not by virtue of the letter of license sought at the trial to be introduced, and put in evidence, and which was rejected by the learned Judge. The Assignment was to *Wier* and *Woodill*, to secure a debt due, as it would seem by the transfer, to them jointly.

Under this assignment it is, beyond doubt, the plaintiff had been paying the rent to *Woodill*, whom we may easily understand to have been acting on his own behalf and on *Wier's*, and to whom he was responsible. There is no evidence of *Woodill* having acted upon the letter of license sought to be introduced, and as I have already mentioned, the money was exacted and paid to him in a different right. I apprehend it is in re-

ference to this state of things that we must regard the undertaking of the defendants to point. In this view, and also having regard to the absence of proof of the due execution of all the creditors, I am of opinion the letter of license was properly rejected, for, although there were respective acts to be *individually* done by them, it evidently was undertaken by each on the joint contract *of all*. I think the all-important enquiry at the trial was, did *Eaton* at the time he paid *Woodill* the \$100, on the 4th of September, 1874, owe him that amount on account of the rent of the Market House under the assignment of the lease? The fifth plea denies this. Of course this would depend upon whether *Wright* owed to *Woodill* and *Wier* so much of the \$800 and interest secured by the assignment. A suit was instituted on the Equity side of the Court to compel, as it was contended, *Woodill* and *Wier* to release the mortgage, and re-assign the lease in question; and a decree of said Court dated the 17th day of April, 1876, by which it was established that there was due to *Woodill* an amount beyond the sum of \$100, was offered in evidence, which the learned Judge rejected. There is no doubt but that the judgment of a Court of competent jurisdiction directly upon the point is conclusive upon the same matter between the same parties coming even incidentally in question in another Court for a different purpose; it is so laid down in *Broom's Legal Maxims*, p. 334. This is also in some instances applicable to judgments between other parties touching the same rights; 8 C. & P., 397: and in *Brune v. Thompson*, 1 C. & M., 34, it was held that a verdict and judgment in a suit where the parties are not the same, may be evidence to explain the transaction, though not conclusive against a party to another suit.

There are numerous cases to the same effect. Regarding the contract between the plaintiff and the defendants, as I do, as an undertaking to hold harmless the plaintiff against the claims of *Woodill* accruing under the assignment, I cannot but regard the decree of the Judge in Equity, if clearly having reference to the same transaction, as very important evidence to show the liability of the plaintiff to pay *Woodill* the sum demanded from him, and against which he was to be pro-

tected. The sole question treated of in the decree was, what amount, if any, of the \$800 and interest secured by the assignment, was due *Woodill* and *Wier* from *Wright*. *Wright* was a party to the suit, and as I apprehend it, would be estopped in any other suit, even *inter alios*, from denying the truth of the facts upon which the decision of the Court was based. I am free to admit that, if *Wright* had been a perfect stranger to the suit in Equity, the proceedings therein would not bind him, but in this case, if the question adjudicated upon was inseparably connected with the contract declared on in this action, I fail to see upon the principles of evidence how the decree was inadmissible in evidence as being immaterial. The grave difficulty which evidently beset the mind of the learned Judge was the insufficiency of the proof of the decree. *McGillivray*, a clerk in the Prothonotary's office, was called, who testified:—"I produce the original papers in *Wright* against *Woodill et al.*, in which the writ issued 2nd September, 1874." The papers were offered in evidence—a Master's report and a paper purporting to be a decree. There is no minute of the decree having been regularly filed, and no pleadings were produced, and only the signature of the Prothonotary was proved. It is laid down in *1 Phil. on Ev.*, 393; *Peakes' Ev.*, 74, and so decided in *Hewitt v. Piggott*, 5 C. & P., 75, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as that a decree was made by the Court) he ought regularly to give in evidence the proceedings upon which the decree was founded. I think therefore the proceedings on which the decree was based ought to have been produced, in order to show the true issue raised, the identity of the transaction, and how far the defendants were to be bound by it.

With regard to the point taken by *Mr. Ritchie* at the trial, in relation to a want of consideration for the defendant's contract, I consider there was ample consideration in the payment of the \$100 contemporaneously with the making of the agreement, and although it is quite possible that it does not come within the meaning and purview of sec. 4 of chap. 83 of the Revised Statutes, it would under the circumstances be binding on the defendants as an ordinary contract. It was

also contended on motion for a non-suit that there was no notice of the claim before it was voluntarily paid. The case of *Smith v. Compton*, 3 B. & Ad., 407, clearly shows that the purpose of a notice is not in order to give a ground of action. Neither is a covenantee for quiet enjoyment bound to wait for judgment and actual ouster by process of law. He may yield possession to the one who has the paramount title and claim for a breach of the covenant. *Wash. on Real Prop.*, 474; 8 *Pick.*, 547; 6 *Gray*, 572. Nor do I think the plaintiff here was obliged to wait until process of law compelled him to pay *Woodill*, provided *'his liability to do so was made clearly manifest.* I do not think such liability in this case was so satisfactorily shown as to justify the plaintiff in allowing *Woodill* to deduct from the private account a debt, which, if due, was due to *Woodill* and *Wier*, and this only three days after he had taken the document or agreement to render him harmless from defendants. He knew the matter was in dispute, and he states in his evidence that "*he knew Woodill had said he had no claim on Wright.*" He should not have permitted *Woodill*, in common fairness to defendants, to pass to his (plaintiff's) debit that which he could not legally set off, and therefore I do not think under the contract he seeks to recover on he is entitled to make the defendants pay the \$100 which by his own wrong he allowed *Woodill* to take from him, and which he might have successfully resisted. I think the rule to set aside the non-suit should be discharged.

KING v. TRUSTEES OF SCHOOL SECTION OF BADDECK.

Where defendant, appealing from a Judge's order at Chambers, discharging an order nisi to change venue from Halifax to Baddeck, alleged that he required five witnesses residing at Baddeck, and that it would cost him \$120 more to try the cause in Halifax than it would in Baddeck; and plaintiff alleged that the attorneys and counsel on both sides resided in Halifax, that he had two witnesses who could more easily be taken to Halifax than to Baddeck, and that it would cost him \$75 more to try the cause in Baddeck than in Halifax;

The Court dismissed the appeal without costs, directing that the testimony of defendant's witnesses be taken *de bene esse*, and received in evidence at the trial in Halifax.

This was an appeal from the decision of Mr. Justice DES-BARRES, refusing to change the *venue* in the cause from

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Halifax to Victoria. The cause was argued during the term of 1876-7.

Meagher, in support of appeal.—The defendants here are School Trustees, who work without reward, and cannot get redress if mulcted in costs. The lease in controversy was made five years before they became trustees. The plaintiff here, residing at Antigonish, brings action in Halifax on a contract made in Baddeck. The *venue* is capriciously chosen, and, if this is not a case for a change of *venue*, no application for that purpose need ever be made. Cites *Payzant v. Montgomery*, decided by RITCHIE, E. J. Not reported.

King, contra.—The only reason why the decision of a Judge at Chambers can be interfered with is that he has misconceived the facts. There must be very strong cause shown. *6 L. R., C. P.*, 119; *Roscoe's N. P.*, 1154; *Durkee v. Cox*, *1 R. & C.*, 143 *Barteaux v. Cobequid*, *1 R. & C.*, 255. The affidavits are loosely drawn. *Phillips* swears to what involves a full knowledge of the case. The statements are loose and untrue.

The issues are simple issues of law, and could not therefore be tried better at Baddeck than at Halifax, even admitting that they could be as well.

The defendants do not all join in the application.

In a case where there were three defendants and only one applied, the Court refused on that ground alone.

The application is too late. *2 Oldright*, 371.

JAMES, J., now (March 26th, 1877,) delivered the judgment of the Court:—

This is an appeal from an order of Judge DESBARRES, at Chambers, to discharge an order to change the *venue* from Halifax to Baddeck. It is a suit to recover rent of plaintiff's building at Baddeck, leased by him to the School Trustees for the time being for five years, and occupied by them and their successors for three and a half years.

The plaintiff lays his *venue* at Halifax. The cause of action appears to have arisen partly at Antigonish, where the plaintiff resides, and partly at Baddeck. The defendant, in support of his application, produced affidavits that he required to pro-

duce five witnesses resident at Baddeck, and that it would cost him \$120 more to bring his witnesses to Halifax than to examine them at Baddeck. The plaintiff on the other hand swears that he requires the evidence of two witnesses resident in Halifax besides his own testimony, that he could much more easily and cheaply come to Halifax than Baddeck, that the attorneys and counsel on both sides reside in Halifax, and that it would cost him at least \$78 more to try the cause in Baddeck than in Halifax. Under these circumstances, it is not surprising that the learned Judge should have refused to change the *venue*. It is only on a very strong case being made that the Court will reverse the decision of a Judge at Chambers on a matter within his discretion, and the Court do not think the defendants have made such a case. The plaintiff denies the necessity of the defendants' witnesses, and the defendants allege that the plaintiff can get all he wants at Baddeck. It is obvious from the papers and the argument that the case will turn largely on matters of law, and that no large body of evidence can be required; and we consider that the course which will best promote the ends of justice and the interests of both parties, and save unnecessary expense, will be to grant a rule to discharge the appeal, on the terms that either party shall be at liberty to take the evidence of witnesses residing at Baddeck *de bene esse*, before a commissioner, the depositions to be evidence in the cause, each party to give the other four days' notice of the examination of witnesses. No costs.

MCKENZIE v. LAMONT.

Where a certificate of the attestation of the execution of a deed contained no date,

Held, that the deed was properly recorded in the Registry of Deeds office, the words of the 13th sec. of ch. 79, R. S., requiring the date of the attestation, being merely directory.

Where a certified copy of a deed was offered in evidence under sec. 23 of ch. 96, R. S., without an affidavit showing that the original was not in the possession, &c., of the party, but the defendant, who offered the copy, was examined as a witness at the trial, and proved that the original was not in his possession, &c.

Held, that the certified copy was properly received.

This was an action of ejectment tried at Pictou in October,

1876, before Mr. Justice WILKINS. Defendant claimed under a deed from Angus Lamont, in the certificate of execution of which the date was omitted. Plaintiff claimed under an attachment against Angus Lamont and sale under Sheriff's deed.

The deed to defendant was dated July 12th, 1869. The certificate of Registrar is 7th of August, 1869.

A verdict was entered for plaintiff by consent, with authority to the Court to enter judgment for defendant if the evidence warranted it. The rule to set the verdict aside was argued during the term of 1876-7.

Henry, in support of rule—The deed to Angus Lamont and the Sheriff's deed, as well as that to defendant, are all in the same predicament as to date in certificate.

The words in the statute are directory.

Rigby, Q. C., cites the Registry Act, R. S., ch. 79, secs. 11, 19. In *Cogswell v. Gray* the Equity Judge decided that an agreement for a lease should not be registered, and therefore, being registered, should be treated as void.

The Equity is of no avail if the formalities are not complied with. The Court cannot draw a line. *McGrath v. Todd*, 26 U. C. Q. B., 87; *Robson v. Waddell*, 24 U. C. Q. B., 574.

The Statute here requires the registration of the certificate with the date. The date is essential. If the date is dispensed with now, the next application will be to dispense with the names of the witnesses.

(McDONALD, J.—The Canada statute in the case cited made the deed absolutely void for want of the formalities. That statute could not be regarded as directory. Our statute can be so regarded.)

The Court in Canada held that where the registry showed itself the defect in the formalities, the deed was void on account such formalities not being complied with, but that they could not go behind the registry to discover such irregularities. *Doe v. Catharine v. Turnbull*, 1 Pugsley, N. B. R., 74; *Street v. Merchants' Bank*, 1 U. C., E. & App., 246; *Freeman v. Bank of Up. Canada*, 2 do., 365; 3 *Kerr*, N. B., 258.

The deed was proved by secondary evidence in circumstances not allowing the original to be dispensed with.

The evidence admitted is not even secondary evidence. The Registry Book should have been put in evidence. It is only by force of the statute that such evidence as this can be given. See Statute, ch. 96, secs. 33 and 35. There was no affidavit here as required by statute. (McDONALD, J.—Does not his deposition in open Court amount to that?) The statute requires affidavit and notice. The evidence was not put in under the statute at all.

There is no evidence that that was a copy that was admitted. Notice was not proved and was not dispensed with.

What evidence have we here that the deed was recorded? The certificate of the Registrar would be evidence of that on the original deed.

The evidence was offered as secondary evidence. (Henry—I deny that it was offered as secondary evidence. It was offered, and that is all.) (WILKINS, J.—I regard it as perfectly good as secondary evidence; and further, if I had been asked to dispense with the notices under the statute, I would have done so.) *Rigby, Q. C.*—In that case I would have gone on with the case, but I treated it as having been tendered as secondary evidence, and knowing that it was not such I consented to the verdict.

The document in evidence is not proved to be a copy of the original.

It was necessary for defendant to show that his deed was registered prior to ours. The certificate of the Registrar or the copy of the deed is not sufficient. It is so only when upon the original deed. *Registry Act*, sec. 18. It must be proved that it was registered anterior to our deed. The certificate does not show the date of recording.

McDONALD, J., now, (March 20th, 1877,) delivered the judgment of the Court:

This is an action of ejectment, and the plaintiff claims under a Sheriff's deed executed after a sale of the lands of one Angus Lamont an absent debtor, against whom judgment had been rendered. The defendant pleaded title.

in himself, and the plaintiff, having obtained leave to reply, alleged fraud in the deed under which the defendant claimed title from the absconding debtor. He also attacked the regularity of the registration of the deed in question. There was no evidence of the alleged fraud, but it is quite clear, as was admitted at the argument, that the plaintiff must recover if the certified copy produced of the defendant's deed is not sufficient to defeat this action. The original deed was not produced, but a copy, certified by the Registrar of Deeds, under the Revised Statutes, ch. 96, sec. 33, was put in evidence. The defendant did not, in the usual way, make the affidavit mentioned in that section, to make it appear that the original was not in his possession or under his control, and that he had searched for and been unable to procure the same, but he was examined at the trial as a witness, and proved all that would be required to be shown by such affidavit if made, and that, I think, was sufficient. Neither did he give notice of his intention to produce such certified copy, under section 35 of the same chapter, but the learned Judge who tried the cause received the copy and it was read. If the reception of the copy was not objected to on the ground of the want of such notice, the copy was properly received, and if it was objected to, the learned Judge who received it must be taken to have, in the exercise of the discretion which the statute gives him, dispensed with the necessity of such a notice, and so the requirements of the statute were fulfilled. I do not see that the learned Judge could well have done otherwise in view of the proved fact that the plaintiff's attorney had previously given the defendant's attorney notice of his intention to give in evidence a copy of the same deed certified in the same way.

It was objected on behalf of the plaintiff that the deed was registered without the date of the attestation being declared on it by the certificate of the Justice who signed the same under ch. 79, sec. 12, R. S., that defect appearing upon the face of the Registry book and on the certified copy of the deed, and the cases of *McGrath v. Todd*, 26 U. C. R., Q. B., 87, and *Robson v. Waddell et al.*, 24 U. C. R., Q. B., 574, were cited; but I fail to see that these cases support the plaintiff's con-

tention. The system of registering deeds in Ontario and the statute regulating the same are very different from ours. In that Province the statute requires that every memorial shall contain, among other things, the names and additions of all the witnesses to the deed, and it provides that every deed shall be pronounced fraudulent and void as against a subsequent purchaser or mortgagee unless such memorial is registered, as by that act directed, before the registry of the subsequent deed. It was of course held under that statute that registry in accordance with it was imperative. The cases referred to do not show more than this. But our statute does not declare that unless the date of attestation be certified the deed shall be fraudulent or void as against any one, or that the registry thereof shall not be effective. There can be no doubt that the deed was proved by the subscribing witness in the presence of the J. P., who so certified, and that must necessarily have been previous to the registry. The substantial requisites of the statute were thus complied with, and I cannot help thinking that the part of the statute which refers to the date of attestation is merely directory.

The deed is dated the 12th day of July, 1869, and is registered on the 7th day of August of the same year, over sixteen months before the writ of attachment under which the plaintiff claims was issued, and the defendant took possession of the land in 1870, according to his own evidence.

If there was in point of fact the fraud alleged by the plaintiff in his replication, he might have proceeded to prove it instead of relying upon what I think is a forced construction of our statute respecting the registry of deeds. I think it is impossible not to set this verdict aside, but, although by the terms of the agreement under which it was entered judgment might be given for the defendant, I think that the plaintiff ought to be given an opportunity to give evidence in support of his replication if he thinks fit.

IN RE MILNER'S APPEAL

A license to search for minerals, granted under chap. 9, R. S., 4th Series, is assignable.

This was an appeal from a decision of the Commissioner of Mines for the Province of Nova Scotia, refusing a license to search for minerals other than gold, applied for by Christopher Milner. One Whitfield McCarthy had previously obtained a license to search over certain areas in the County of Cumberland, and assigned this license to one John M. Hays, who applied for and obtained a license to work a certain area of one square mile selected from the areas covered by the license to search. Milner presented an application for a second license to search over the same areas, depositing the usual fee. He was notified, upon the expiry of McCarthy's license to search, that he could obtain a license to search over the said areas, except the area covered by the license to work granted to Hays. Milner declined to take out the license thus limited, and the parties were heard before the Honorable Commissioner of Mines, who confirmed the license to work over one area to Hays. Milner appealed from this decision on several grounds, the principal ground being that the holder of a license to search could not assign such license. The appeal was argued March 12th, 1877, before YOUNG, C. J., and DESBARRES, WILKINS and McDONALD, JJ.

Graham, for appellee, takes preliminary objection that the affidavit for appeal is headed "In the Supreme Court."

Meagher, for appellant, cites ch. 9 of R. S., 4th Series, of Mines and Minerals. Section 89 requires the holder of a license to search, not mentioning the word assignee, to make a report to the Government as to the results of his search. This neither McCarthy nor Hays ever did. Even McCarthy, therefore, is not entitled to a license to work,—sec. 96.

A license is a personal right, not assignable. The first clause of the Act, the interpretation clause, defines lessee to include any person holding from a lessee, but gives no such definition under the word license. The bond given on obtaining a license to search is a personal bond to indemnify for

acts that may be done by the licensee, and is not renewed upon taking out a license to work. Hays gave no bond on obtaining his license to work. The licensee might assign his license, if at all, to a pauper, and the Crown would have no security that private rights would be protected.

Even a lessee cannot assign without the concurrence of the Crown; sec. 101 of the Act, sub-sec. *d*.

As to legal effect of licenses, cites 1 *H. & N.*, 39; 2 *Bl. Com.*, 247; *Ch. on Real Actions*, 687; *Burton's N. B. Rep.*, 133; 2 *Kerr N. B. R.*, 524; 1 *Allen's N. B. R.*, 443.

Even if McCarthy could assign his license to search, Hays could not select the area to work without a special power of attorney to do so from McCarthy. The affidavit to obtain registry of the assignment is not sufficient, as the party administering the oath merely signs himself "J. P.," and there is no evidence that he was a Justice of the Peace. 3 *Kerr N. B. R.*, 301.

Graham, contra.—To hold now that these licenses are not assignable, would unsettle the titles of a great many parties here and in England. Our Statute of Frauds, R. S., ch. 83, secs. 1 and 2, is extended to Mining areas. Section 132 of the Mining Act requires all transfers of mining rights, except licenses, to be registered. The license to search gives an interest; it allows the licensee to dig on other people's lands, and to obtain a license to work and then a lease. Cites *Bambridge on Mines and Minerals*, 82 and 85; 2 *Mod. Rep.*, 317.

The statute does not require a new bond on the granting of a license to work, which certainly may be assigned, as it gives an undoubted interest with a power; the argument that the form of bond in evidence does not protect in case of assignment of lease to search is equally good in that case. But the Court must not assume this bond to be the bond required by the statute. Section 96 of the Act extends the bond given for a license to search to acts done under the license to work.

Meagher, in reply.—The very terms of the license to search make it personal. Section 132 excepts licenses from registry because they give no interest in the land that could be encum-

bered. Sections 140 and 141 provide for transfers to assignees in Insolvency, &c., but only for transfers of leases. *Bambridge on M. & M.*, 242. This license to search is in reality merely a defence to an action of trespass.

YOUNG, C. J., now (March 26th, 1877,) delivered the judgment of the Court:—

On the eighteenth of January, 1875, a license to search for mines and minerals on an area near Maccan was issued to Whitefield McCarthy which he assigned by deed on the fifteenth day of January, 1876, to John M. Hay. On the fourth or fifth of January, 1876, Charles Milner applied for a license to search on the same area. On the seventeenth Mr. Hay applied for a license to work coal mines and minerals on a square mile defined by metes and bounds within said area, and his right to such license was disputed by Mr. Milner, chiefly on the ground that the original license to search was not assignable, and the case having been investigated by the Commissioner of Mines, who declared in favor of Mr. Hay, Mr. Milner appealed from his judgment under the Act, ch. 9 of the Revised Statutes, 4th series.

The case was argued before us in the present term, and the nature of such licenses, with the various sections of the Act, discussed. The point is of considerable importance and of some difficulty, and we have looked carefully into it, and all the more that but few authorities were cited or are to be found upon it, and that the Deputy Commissioner testifies that the transfer to Hay was duly registered, and that it is customary in the office to receive and register transfers of licenses in coal areas. Now the first question is, what is the nature of a license to search? For mines other than gold mines, it is granted under the 8th clause of the Act, to be in force for one year, to enter upon lands and to dig and explore for minerals, a bond being first given, with sureties, that in the event of entry upon private lands, recompense shall be made for damages in the manner thereafter provided. The form of the bond,—the only one required by the Act,—is given in the papers as required from Milner, and as the condition is confined to the entry and other acts of the licensee, not ex-

tending to any other holder of the license, the bond does not afford the security contemplated by the Act. This, however, is a defect easily remedied in future applications.

By the 93rd and subsequent sections, the holder of a license to search, (an expression somewhat wider it may be thought than the licensee,) may at any time within the year, or an extended time if granted, select one square mile within his area and apply for a license to work the same, which shall be for a term of two years, or an extended term, upon an additional payment; and within such term the holder of the license shall commence effective mining operations and shall continue the same in good faith until the expiration of such term. Then, by the 98th section, the holder of a license to occupy and work, or those representing him, shall be entitled to a lease which, in the case of a coal mine, by a new clause in chap. 9, R. S., not in the consolidating act of 1869, he shall not assign or transfer without the license and consent of the Governor in Council.

Here is a series of steps gradually matured for the protection and development of a most important industry, requiring skill and capital combined, and a uniform and sustained action.

The license to search is the first of three steps. It gives large powers; it may require considerable expenditure. If the hit has been fortunate it may be of great value; it is often eagerly sought for, and when obtained is warmly prized and defended. Conferred by statute, it is a possession or right, whether it be accounted an interest in lands or not, plainly distinguishable from the numerous classes of licenses and easements, whether of pleasure or otherwise, to be found in the books. These are frequently of a personal character, of short duration, and of little moment, things, as CHIEF BARON POLLOCK called them (*1 H. & N.* 39,) "so evanescent that they cannot be transferred." Such licenses are in their nature mere personal privileges, not assignable by the licensee, not enuring to his representatives, and not binding upon the heirs or assignees of the estate in respect of which they are granted. So long as they are unexecuted, they are revocable by the grantor; *Browne on the Statute of Frauds*, sec. 22. A

dispensation or license, says, C. J. VAUGHAN, properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. Thus a license to hunt in a man's park and carry away the deer to his own use, to cut down a tree in a man's ground and to carry it away next day to his own use, are licenses as to the act of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down they are grants; *Thomas v. Sorrell*, Vaughan, 351.

These examples illustrate the distinction, as it seems to me, between the ordinary license and the license to search or to work under our statute. It was argued that the 1st section defines the word "lessee" as including sub-lessee or any person deriving title to a mine through a lessee of the Crown but does not define the word "licensee" as including his assignee. The objection is ingenious, but not conclusive, for we must look to the whole scope and purview of the Act. If it applies to a licensee for search, it must also apply to a licensee for work, and would operate as a discouragement and obstacle to the employment of capital and labor on coal mines, which the legislature, as I think, could never have intended. Besides, I have great doubts whether a third party can interpose between the assignee of a licensee acting *bona fide* and the government who have registered his transfer and are disposed to recognize him as having an equitable, if not a legal right. The only authority at all in point that was cited at the argument was from 2 *Kerr's Reports*, 529, where CHIPMAN, C. J., speaking of Crown licenses for the cutting of timber, says that such licenses are not assignable, and refers to an American case, 6 *Green Rep.*, 81, 200. This may depend, however, on the form of such licenses, or the terms of the New Brunswick or American Acts, to which we have no access. The minor objections to the affidavit for registry and to the want of a survey and report, by *McCarthy*, seem to me of little avail, and, for the reasons I have assigned, I am of opinion that the appeal should be dismissed with costs.

DESBARRES, J., said he concurred in the opinion of the learned Chief Justice. He thought it would be a hardship if

a party, after expending a large sum of money, and making discoveries which he could not develop, was not allowed to assign his license.

WILKINS, J., read the following dissentient opinion :—

Nothing in my opinion can be clearer in view of the statute, whatever the practice of the Commissioner's office may have been, than that a license to search under sec. 86 of chap. 9, R. S., is a right purely and strictly personal, and a right not transferable under the statute ; nor, as I am strongly inclined to think, would it be at common law, independently of the statute. Such mere personal right is a plain result of the language of section 86, and follows from the very nature of that right itself, and there is not a word in the chapter which warrants a contrary inference. The bond actually taken from McCarthy and proved to be in form the only bond taken, affords an argument, if any were needed, to confirm the view expressed, and an argument of irresistible force. If Hay, under the transfer to him, in searching, had unlawfully invaded the rights of the owner of the land over which he prosecuted a right of search, and were unable personally to respond for the damages, the proprietor of the soil would be in effect left perfectly unprotected. Such never could have been the intention of the Legislature. An argument drawn from the custom of the office, or public policy, or the furtherance of public interests in relation to a branch of public industry or revenue, can have no weight whatever with me when judicially required to expound a statute or to decide upon a question of right between subjects or between the Crown and a subject. When McCarthy's personal interest under his license ceased, Milner's interest attached, and having performed the required conditions of the statute, his legal rights should not have been disregarded. The fact that a sub-lessee is included under the term lessee in section 1, and the phrase, "or those representing him," being found in sec. 98, support the otherwise plain construction of the statute. It is only when a real interest in the bowels of the earth is obtained by license or lease that there can be in any sense a representative of a lessee or licensee.

MCDONALD, J., said he concurred in the opinion expressed by the learned Chief Justice. The license was a right for which the party paid his money, and he thought it was assignable.

COX v. GUNN.

On the trial of an action for malicious arrest the Judge is not required, when the evidence touching the facts upon which the question of reasonable cause depends is contradictory, to tell the jury whether or not there was reasonable or probable cause for the arrest, but directs them properly in telling them that, if they find one way on the evidence, there is reasonable cause, if they find otherwise there is not.

No record being filed in the Supreme Court of judgments in causes appealed from Magistrates' Courts, the termination of the proceedings under which the arrest was made is sufficiently proved, in support of an action for malicious arrest by the testimony of a competent witness who heard the judgment on the appeal pronounced in open Court by the Judge.

One hundred and fifty dollars not excessive damages for arrest and detention by a constable for half an hour, where the plaintiff was put to the expense of defending a suit before a magistrate and prosecuting an appeal.

This was an action for a malicious arrest, the plaintiff having been arrested and detained half an hour or thereabouts by a constable, under a *capias* issued by a magistrate at the instance of the defendant. The plaintiff contended that no debt was due from him to defendant when the *capias* was issued, and that there was no ground for the arrest. The cause was tried before Mr. Justice DESBARRES at Halifax, in April, 1876, and a verdict found for plaintiff, damages, \$150. A rule *nisi* to set the verdict aside, on the usual grounds, and on the ground of excessive damages, was taken out under the statute and argued January 6th, 1877, before four Judges.

McDonald, Q. C., in support of the rule.—There is no evidence of malice. The learned Judge who tried the cause misdirected the jury in telling them that if the plaintiff did not owe the amount sworn to by the defendant the arrest was malicious. His Lordship did not tell the jury whether there

probable cause or not, as he should have done; *Lister v. Syman*, 4 L. R., H. of L., 521. The Judge should ask the jury to decide upon the facts, and tell them what facts will constitute probable cause. His Lordship misdirected the jury. I contend, in regard to the evidence itself, telling them it was so difficult to believe under the evidence that the plaintiff had agreed to sell certain lands to the defendant, that the defendant's evidence is corroborated by Mr. Fairbanks of the Crown Land office. Cites *Wier v. Weald*, 4 L. R., 730. The damages given are excessive, \$150, for being in the custody of a constable half an hour, not in jail. There is no proof that the proceedings below were terminated in this action was commenced. No record was produced. See *N. P., Ev.* 858.

ompton, contra.—The jury have paid no attention to Mr. Banks' testimony, because he did not swear to his recollection of the matter, and did not and could not contradict the testimony as to what took place. Cox swears that he demanded from him eight or nine dollars only, and he does not contradict him on this point; and yet, the same day he demanded that sum, Gunn went to a magistrate and swore Cox owed him *forty nine* dollars, and that he believed the debt would be lost if a *capias* was not issued. The action will lie for suing out a *capias* for a larger amount than is due. *Add. on Torts*, 600, 603; 3 *Barn & Cress.*, 139; & *Bl.*, 929. Gunn does not swear Cox was indebted to him forty dollars in money for the horse. If there was any act, it was that Cox was to give the land for the horse. The misdirection is out of the question under the authorities. The damages can certainly not be called excessive. The plaintiff actually incurred about fifty dollars expenses in consequence of defendant's action. As to the ground that no record of the proceedings on the appeal was produced, there is no record in appeal and summary cause. The evidence of a by-stander, and especially of a counsel in the cause, is sufficient. *Id.*, sec. 386. The notes of the Judge or Prothonotary of the court, or the filing of the Judge are not indispensable under the statute. The presumption is that the proceedings were terminated, and the appeal was taken out to the next term.

McDonald, Q. C., in reply.—The question here is not whether the plaintiff owed the defendant forty-nine dollars, but whether the defendant thought he did. *15 U. C., Q. B., 279*. Here we have at least evidence of a transaction involving the whole amount sworn to in the affidavit for a *capias*. The plaintiff was bound to show that there was no probable cause for the arrest.

MCDONALD, J., now (April 2nd, 1877,) delivered the judgment of the Court:—

The plaintiff claims damages for a malicious arrest under a *capias* issued by the Stipendiary Magistrate at Truro, at the instance of the defendant, and at the trial the evidence was very contradictory. The defendant's own evidence showed no *legal* cause of action for the amount sworn to and endorsed on the *capias*, but if he had not been contradicted by the plaintiff the question of malice and reasonable cause might be doubtful. But, taking the evidence as it is, and the questions of fact, upon which the other questions of reasonable cause and malice depend, having been found by the jury in favor of the plaintiff, we cannot, I think, disturb the verdict on the ground that it is, in that respect, against the evidence. Behind this, however, are three objections urged on behalf of the defendant, namely: misdirection, want of sufficient evidence of the termination of the suit in which the *capias* was issued, and excessive damages. Touching the first of these, it is contended that the learned Judge who tried the cause left too much to the jury, and that he should have told them whether or not there was reasonable or probable cause. No doubt if the evidence had been clear and uncontradicted it would have been the duty of the Judge to say whether there was or was not reasonable cause, and to have non-suited the plaintiff if there was not; but, when the evidence is contradictory, as in this case, touching the facts upon which the question of reasonable cause depends, the course taken by the learned Judge who tried the cause is, in my opinion, unexceptionable, and in accordance with the judgment in *Rowland v. Samuel*, 11 Q. B., 39, in which DENMAN, C. J., said:—"I think my learned brother put that in the manner required by *Panton*

v. *Williams*, not requiring them to find a special verdict, but saying, if you find one way on the evidence there is reasonable cause, if you find otherwise there is not."

In *Lister v. Perryman*, as reported in 4 L. R., Eng. & Ir. Appeals, 529, and cited by the learned counsel for the defendant, the head-note of the report reads as if it was decided that the Judge must first take the opinion of the jury on the question of fact, and then decide the question of reasonable cause; but it will be seen at once, on reading the judgment, that no such question was decided in that cause, although I have no doubt that, in many cases, that course might be very properly taken. In that case there was contradictory evidence as to whether or not the defendant had seen one Robinson before he caused the arrest to be made, and the Judge charged the jury that, if he had not, they ought to find for the plaintiff. This direction was overruled, not for the reason mentioned, but because there was evidence given of reasonable cause notwithstanding that the defendant did not see Robinson.

As regards the question raised that there was not sufficient evidence to prove the termination of the proceedings under which the arrest was made, it may be said that, no doubt, the records, in cases requiring them by law to be filed, would be the best evidence; but in *Pierce v. Street*, 3 B. & Ad., 397, it was held that not declaring for a year after the return of the writ was evidence of the determination of the suit and supported an averment that the plaintiff in the original suit permitted it to be discontinued.

It was objected in that case that there was no judgment of *non pros* or rule of Court discontinuing the suit, but it was held that proof of twelve months having elapsed without filing a declaration was sufficient. In *Arundell v. White*, 14 East, 216, which was also an action for malicious arrest, under a plaint issuing out of the Sheriff's Court, London, it was held that the practice of that Court being to make an entry in the minute book, proof of such entry was sufficient to show that the suit was at an end. It was not considered necessary in either of these cases that there should be a judgment entered, or a rule taken out, or a record filed, to enable the plaintiff to recover.

We know that by the practice of this Court no record is ever filed in appeal causes; and sec. 266 of our Practice Act, while it requires both the bill of costs and record to be filed in declaration causes before execution issues, requires that the bill of costs *only* shall be filed in summary causes. There is no law that I am aware of which, in appeal causes, requires the decision of the Judge to be reduced to writing before it becomes operative, and I think that when it is publicly pronounced in Court, as is the practice in this Court, the suit is terminated so far as may be necessary to support an action of this kind; and I am of opinion that a decision so given may be proved by any competent witness who knows the fact. Here it is proved by a gentleman of the bar who was counsel engaged in the trial of the cause, and says that the judgment of the Stipendiary Magistrate was reversed in the Supreme Court; and the fact was not denied by the defendant, who says that he was present at the trial.

I think that as soon as the decision on the appeal was pronounced, the plaintiff might have safely issued the writ of summons in this cause, and that, therefore, the defendant cannot succeed on the ground just adverted to.

On the question of excessive damages I need not say more than that, in actions of this kind, the authorities clearly show that a new trial is seldom granted for excessive damages unless they be outrageous, or unless it appears that the jury acted under undue influence or gross error, neither of which appears to have been the case here.

The damages in actions for malicious arrest are not necessarily estimated by mere calculation, and, besides, it is proved that this plaintiff was put to considerable expense and trouble in defending the suit before the Stipendiary Magistrate and afterwards prosecuting his appeal, both times away from his home and out of the county in which he resided. The rule nisi for a new trial will be discharged with costs.

MONTGOMERY v. HART.

Where defendant, in an action of trover, pleaded accord and satisfaction, and produced a written receipt in full, which he testified plaintiff had signed, on receiving certain goods pursuant to agreement, and plaintiff testified, "I never signed such a receipt as this; It looks like my signature; I don't think it is; It is very like it; I'd say the signature was mine if I didn't see the writing above it;" and again, after hearing defendant's evidence; "He (defendant) produced a receipt similar to the one produced, which I refused to sign; I read the one I signed before doing so,"—but did not produce any witness to examine the signature, as proved by defendant, and express, if he could, a doubt as to its genuineness;

Held, that the verdict for plaintiff could not be sustained.

The rule *nisi* to set aside the verdict for defendant in this cause was argued during the Term of 1876-7 by *Meagher* and *Rigby*. Q. C., for and *Sedgewick* contra.

WILKINS, J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

After hearing the argument in this cause, I quite agree with the learned Judge who tried it, that on the issue raised as to accord and satisfaction the preponderance of the evidence is so strongly, so decisively, in favor of the defendant that the verdict should have been for him. It appears to me, in view of the evidence, regarded in the light of the law bearing upon it, that the verdict given for the plaintiff cannot be sustained.

This is a question entirely between the parties, and no creditors are before us whose rights and interests are to be enquired into. The observation is made in view of a case cited at the argument from *4 Ves.*, 395. Looking to the issue referred to as raised, and its result, the matter stands thus: The plaintiff being in fact interested, as a partner with others not in the record, in the goods in question, and having demanded them from the defendant, brought his action to recover the value of them; i. e., of course, the value of his interest in them. The defendant, admitting his right to sue as an individual, because he had sued as such, says, in effect, after you had a right of action and claimed the goods you agreed with me, in order to end the dispute between us, that, if I would deliver to you certain articles specified, you would regard the delivery thereof as a final settlement of our differ-

ences, and that you would receive the articles in full satisfaction and discharge of all your claims, grievances and damages. I delivered the articles and you received them in pursuance of what had been so agreed on between us, and before the commencement of this action, in full satisfaction and discharge of those causes of action which are stated in your writ. *Callisher v. Bischoffsheim*, L. R., 5 Q. B., 449.

The plaintiff, not having replied, traversed the allegations of the plea. The verdict for the plaintiff being general, the question is, does the evidence reported as given for the defendant, considered together with the plaintiff's evidence, so clearly sustain the plea that no reasonable doubt can be entertained on that point of enquiry? As I view the subject of enquiry, I am constrained to hold that, if the defendant's evidence be not in its nature *absolutely conclusive*, it so enormously preponderates that the opposing testimony is but a feather in the other scale. Defendant's testimony, (corroborated greatly, I might say confirmed, by his book-keeper,) was given as follows:

Levi Hart, sworn.—“I am the defendant. I had disputes with plaintiff about the goods. I claimed them under the bill of sale for the firm. He brought me lists of the goods. He spoke to me of this list, No. 9. I think this was in March, 1875. After that we had a final settlement at my office, when the last witness was present at his desk. He agreed to have a final settlement. I agreed with him that if I gave up certain articles, he'd give me a receipt in full. I don't remember the things, but they were not the things sued for now. Paper 9 was before him. I then gave him a buffalo robe as one of the things. This receipt, No. 8, was then written by me. It is probable I read it. Either he or I read it. It was then as it is now. He never disputed it till this suit. That was to put an end to all disputes. I held the goods for our firm and assisted in closing up. I don't remember getting any other receipt.” Cross-examined by Thompson.—“I said to him, to end matter, I'll give you so and so if you'll give me a receipt in full of all demands of your own or of Wm. Montgomery & Co. He consented to do so and I wrote the receipt—only wrote the one.”

The plaintiff was certainly called upon to answer this, and had a full opportunity of doing so. He, in express reference to his alleged receipt, relied on and proved by defendant, and being in these terms, viz.:—"Received March 23rd, 1875, of Levi Hart, all the goods and sundries that were in his possession at the Nova Scotia Iron Works, and on which I laid my claim for myself and for Wm. Montgomery & Co. (Sgd.) JAMES MONTGOMERY,"—said,—*"I did make a settlement of my own property, and gave a receipt, but not for this other. I never signed such a receipt as this. It looks like my signature. I don't think it is. It is very like it. I'd say the signature was mine if I didn't see the writing above it."* After he had heard the defendant's testimony he was recalled. All he said on the subject of the receipt when thus put a second time in the box was,—*"He, defendant, produced a receipt similar to the one produced, which I refused to sign. I read the one I signed before doing so. The firm's name was not named on the receipt I consented to sign."* He did not, be it observed, think it necessary to call a single witness to examine the signature as proved by defendant, and, in relation to it, express (if he could) a doubt as to its genuineness.

HART ET AL V. WESTERN UNION TELEGRAPH CO.

The Court will order a defendant corporation doing business in Nova Scotia, though incorporated abroad, to answer interrogatories, under ch. 96, R. S.

The officers of such Company can be interrogated, though not mentioned by name in the commission to interrogate.

This was an appeal from an order made by Mr. Justice SMITH, granting a commission to interrogate the President, General Manager, or other officer of the Western Union Telegraph Company. The appeal was argued during the Term of 1876-7.

Meagher, in support of rule.—There is no sufficient identification of the telegram in the interrogatories. The second

interrogatory is one fishing for information. The third is also objectionable.

The fourth, fifth and sixth are irrelevant. The sixth is absurd and impertinent, fishing for information. Cites 7 *Exch.*, 229; *Harrison's C. P. A.*, 264, note *p*, citing 4 *El. & Bl.*, 483.

It is admitted by the rule that this is a foreign corporation sued in this action. These interrogatories are asked for under R. S., ch. 96, sec. 11, p. 538. That does not apply to a foreign corporation. The word officer in the statute means a President or Director. The defendant Company has no officer here, merely clerks and bookkeepers; see *Bouvier's Law Dict.*, vol. 2, p. 255. Suppose the defendants refused to obey an order for these interrogatories, an attachment could not be issued against them, and it is absurd to ask the Court to grant an order which it cannot enforce; 8 *L. R. Exch.*, 149; 4 *L. R. Exch.*, 87. In *Belloni v. Sydney & Louisburg R. Co.*, it was decided by the Court that the word "person" in the second part of our Practice Act does not cover foreign corporations. The officer to answer these interrogatories should have been named. *Angell & Ames on Corporations*, sec. 403, 637; 4 *C. B.*, 704; 4 *Gray*, 424.

Rigby, Q. C., contra.—Cites *Fisher's Dig.*, 2614; 1 *Jurist*, N. S., 1139. The defendants appear and plead and render themselves amenable to the orders of the Court. Interrogatories are coextensive with right of discovery. It surely could not be contended that we could not file a bill for discovery against a corporation whose headquarters were out of the Province; *Day's C. L. P. A.*, 307. Interrogatories are allowable that seek secondary evidence of written documents that are lost. We have a right to make our case by means of interrogatories. The distinction between officers and clerks cannot be sustained. We would apply to an officer, taking the risk of what he knew.

As to the character of the interrogatories, that is within the discretion of the Judge; *Day's C. L. P. A.*, 308, citing a case where the decision of MARTIN, B., was sustained against a previous decision of three Judges, with whom he had disagreed; 4 *L. R. C. P.*, 184, 190-1.

It is absurd to argue that the order should have named the officer to answer the interrogatories. The officers of the Company are frequently changed.

If we proceeded by attachment, in case the interrogatories were not answered, we would attach the property of the Company; *Dan. Ch. Pr.*, 145, 146.

Meagher, in reply—The party should not get answers here which the statute will make evidence to questions which he could not ask at a *nisi prius* trial; *Harrison's C. L. P. A.*, 260. Corporations cannot give sworn answers. The only way of getting a discovery from them is to make an officer a party to the suit; *1 Daniell's Ch. Pr.*, 144.

Nothing that occurred between this Company and another Company can affect this suit.

JAMES, J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

This is an appeal from an order of Judge SMITH, (under sec. 11 of ch. 96, R. S.,) that the defendants, who are a foreign corporation, with their headquarters in New York, but doing business in this Province, should answer certain interrogatories, under the oath of their President, General Manager or other officer.

The plaintiffs have brought their action to recover damages for the delivery to them at Halifax of a telegraphic message sent to them by their mercantile correspondent at Kingston, Jamaica, which was delivered in a form different from that in which it was transmitted, whereby the plaintiffs sustained damage.

The objections relied on are, first, that defendants are a foreign corporation and out of the jurisdiction of the Court. This objection is met by the case of *Pohl. v. Young*, 1 Jur., N. S., 1139, cited in *Fisher*, 3614, where it is held that the Court will order a plaintiff, though a foreigner resident abroad, to answer interrogatories.

Secondly, it is contended that the officers of a corporation cannot be interrogated, because they are not parties to the suit. It was contended on the argument that the statute only applies to home corporations. This objection is purely technical, and, if

allowed, would tend to defeat the ends of justice, and I do not find among the authorities cited any one which sustains it; they all but serve to distinguish between the Company and its officers, where such distinction is necessary from the circumstances of the case, to prevent injustice. In this case no injustice can be done either to the Company or its officers by granting the order, and as the Company can only give the information required through the examination of its officers. if it be not granted, a very necessary and salutary law will be defeated. Section 11 expressly gives this power, and it is not, either in terms or by just implication, confined to home corporations. If the plaintiff fails to find means to enforce it, it will be his misfortune, and if the defendants obtain an unjust advantage, by disobeying the order of the Court with impunity, they really cannot complain of any injustice done to them.

The fourth objection, (the third being abandoned,) is that the interrogatories are improper and inadmissible. I do not think so, nor do I think it is important that the officers should be mentioned by name. It is the usual practice to grant commissions to examine witnesses whose names are unknown, and I can find no authority to the contrary. As for the propriety of the interrogatories, not only are they such as a Court of Equity would sanction under a bill of discovery, but I do not see that they are subject to any of the objections which have been sustained in the cases cited, and I think this is a case in which the fullest liberty should be allowed to the plaintiffs. The defendants are not only in possession of nearly all the information on which the plaintiffs must rely, as respects their own internal arrangements, but they are in possession of a perfect knowledge of their arrangements with the other telegraph lines over which the message must have come, and it is obvious that unless the plaintiffs in this case are entitled to demand this information, without which they are utterly helpless, from the defendants, there is no other way in which they can procure it. The business community are continually basing the most important commercial adventures on messages from all parts of the world, which have come over several lines in succession, the owners of which divide

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the profits between them by private arrangement. The senders and receivers of these messages know nothing of these arrangements, nor can they even be aware over what lines the messages have been sent. It is to obtain information of this kind that the interrogatories have been framed, and if such interrogatories are not to be allowed the community will be entirely at the mercy of the Telegraph Companies, without even the consolation of knowing to which of them they ought to look for redress for the most serious injuries. If it be the duty of the Court to depart from the language of the Act in any case, in the way of restricting its operation, it cannot, surely, be in a case of this kind, where the defendants' power is so large and dangerous a power of committing injury, either by negligence or fraud, and where, with all the aid the law can give them, the injured parties must, under the circumstances, have so many and serious practical difficulties in the way of obtaining redress.

I feel bound, therefore, to express my opinion that the appeal should be discharged with costs, and the order confirmed.

IN RE ESTATE OF H. KENNEDY.

H. K. died at a very advanced age, having been faithfully and kindly cared for during the last three years of his life by his son, J. K., and his son's wife. He had promised in consideration of this attention and care to devise one of his houses to a son of J. K., but died intestate. No bargain appeared to have been made between H. K. and J. K. as to the remuneration J. K. and his wife were to receive for taking care of him.

Held, that J. K. was entitled to receive reasonable compensation for the services rendered, out of H. K.'s estate, which was considerable. J. K. had lived in one of H. K.'s houses during the time he took care of the old man, without paying rent, and the Court allowed him \$800, on appeal from the Probate Court, which had allowed him \$300, and ordered the costs of the investigation and appeal to be paid out of the estate.

This was an appeal from a decree of the Judge of Probate for the County of Halifax, who had allowed James Kennedy, the appellant, \$360 for board and care of H. Kennedy, his father, who died intestate, leaving considerable property. The appeal was argued March 6th, 1877.

McDonald, Q. C., in support of appeal, sets out the services rendered by the appellant and his wife, for which compensation is claimed, and states that there is no pleading alleging the matter of set off urged by the other side, viz., the fact that the appellant, while boarding his father, had lived in one of his father's houses rent free.

Meagher, contra.—The grounds of appeal are too general; cites *in re Titus*, (unreported,) where the Court decided that the grounds were not specific enough. The charge of \$8 a week for board is excessive.

The statute of limitations shuts out the claim previous to 1870, as the investigation of it did not take place till 1876. (YOUNG, C. J.—The time of the death is the time from which period must be reckoned.)

Thompson.—This is altogether between members of the same family, and there was no bargain for services. There was no intention that there should be any charge at all. During the whole six years they did not ask for a fraction of money. This demand was made in consequence of the disposition made of the estate, no will having been made. (McDONALD, J.—If he led them to believe he was going to give them a larger portion of the estate, does not that account for no demand being made?)

The property was all rentable buildings. (*McDonald, Q. C.* —There is no evidence of that.) It is in the inventory. The Court must take notice of the papers on file in the lower Court. (*McDonald, Q. C.*—The inventory is no part of the argument.) If it comes to that, no papers are on file. (Minutes of evidence are allowed by the Court to be filed as of to-day.) *Thompson* proceeds to insist that the inventory must be taken as part of the papers, and argues from it. They were all living in one of his houses. He was for a long time well and hale, and they used his house and his pasture.

As to the necessity of pleading set off, there are no pleadings in the Probate Court, and the matter is one of oral testimony only.

The amount allowed below would be enough to support the family out and out in their circumstances of life. (*McDonald,*

Q. C., withdraws objection to inventory. YOUNG, C. J., claims the right to look at all the papers on file.)

McDonald, Q. C., in reply.—I do not know what authority there is for the statement that there are no pleadings. The allegations and pleadings are as carefully prepared and filed as in Equity or at Common Law, otherwise a claimant would be liable to every kind of surprise. The evidence shows that the amount decreed below was inadequate as compensation for the care bestowed upon the old man.

YOUNG, C. J., now, (March 26th, 1877,) delivered the judgment of the Court:—

This is an appeal from a decree of the Judge of Probate at Halifax, allowing to James Kennedy, a son of the intestate, the sum of \$360 for attendance on the old man, chiefly by the wife of James, for three years preceding his death. A large body of witnesses were examined, and they all concur in describing the care bestowed on the deceased as constant and meritorious. He was very old and feeble, was afflicted with a skin disease of an offensive kind, and had an attack of typhoid fever, and he was treated with uniform kindness and affection. His sense of this he intended to show by the bequest of one of his houses to Hugh, a son of James, but he died intestate, and a promise or expectation of this character would not of itself sustain a legal demand. The claim, therefore, is to be treated on the ground of a *quantum meruit*, and with a view to the whole tenor of the evidence, and to the opinion of the professional man that the remuneration should be liberal, we think that the sum decreed is too little. The old man left no personal property of any account, but his real estate was appraised at \$9,500. His rents seem to have been paid chiefly to himself, though it does not appear what became of them. James testifies that he received no money from his father, nor did his wife or child receive any. He occupied part of the house in which he and other tenants lived, and had the use of the pasture for his cows, but for all the attendance and care lavished upon the old man he declares that nothing was paid. He put in a claim, therefore,

for a very large sum, which it is impossible to allow, but we think that the sum of six hundred dollars would be a moderate compensation, which we award him accordingly, the costs of the investigation and appeal to be paid out of the estate.

TITUS ET AL v. HAINES.

A widow is dowable, in this Province, of wild lands.

The extent to which wood may be cut by a widow or any one claiming under her, on wild lands assigned to her by way of dower, before the party is guilty of waste, must be left to the discretion of the jury under the direction of the Court.

Defendant, under the authority of the tenant in dower, cut down hardwood in a field of eight or ten acres, which he fenced and cultivated, rendering it more valuable than in its original state, and also cut a valuable knoll and other trees outside the field for sale, having paid the tenant in dower \$90 for the privilege of doing so. For the former the jury acquitted him; for the latter they awarded \$50 damages. Verdict sustained.

This action was brought by Timothy Titus and Catherine, his wife, to recover damages for waste committed on a lot of wild land which had belonged to James Roop, the father of Catherine Titus, and had been assigned to his widow by way of dower. The alleged waste consisted in the cutting of hardwood trees on the land by the defendant, William H. Haines under the authority of the widow. There was a second heir, Christopher Roop, who was not joined as a plaintiff in the action. On the trial the jury acquitted the defendant as to the cutting on a portion of the land, which the evidence shewed he was improving, but found \$50 damages against him for cutting wood on other portions of the land for sale. The rule *nisi* to set the verdict aside was argued March 7th and 8th, 1877, before Sir W. YOUNG, C. J., and DESBARRÉS, WILKINS, and McDONALD, JJ.

Thompson in support of rule.—The plaintiffs should become non-suit, because they have not joined all the heirs of James Roop. The authorities on this point all came up and were cited and reviewed in *Titus v. Sulis*. This is substantially the

same action as that under another name. Cites 6 *T. R.*, 776.

A justification is completely made out. 2 *Scribner on Dower*, 747, 750; 4 *Kent*, 78; 1 *Greenleaf's Cruise*, 121, note 2, 123, note 1, 2 *Hilliard on Torts*, 155, 157.

The acts committed do not amount to waste. See 1 *N. & M.*, 13; 14 *M. & W.*, 589, 1 *Greenleaf's Cruise*, 195, n. 1.

The damages the jury gave were for the cutting outside the cleared field. Those alleged injuries, the defendant declared, aided the clearing. They rendered the lot as a whole more valuable. We say the wood on that lot would not justify us in clearing those eight or ten acres at all, but that in consideration of that clearing we had a right to cut on other places. The testimony on that point is overwhelming.

The wood from the clearing would not, according to the evidence, amount to \$30.

It is said that the widow had the homestead. She had only one-third of that, not enough to keep up the fences.

The damages are excessive.

There is no evidence to show that there was not sufficient wood left in proportion to the clearing.

Christopher, the other heir, was cutting, and besides there was a license as to his share; therefore the only damages can be for the half-share of Titus. The widow is entitled to firewood and estovers, yet the verdict covers all the wood cut outside of the cleared lands.

(McDONALD, J.—Could she sell her estovers?)

I think she could if Haines chose to supply her with coal.

This form of action cannot be maintained against Haines.

T. W. Chesley, contra.—This is an entirely different action from *Titus v. Sulis*. Titus has given \$90 to this widow for clearing the land.

As to non-joinder, we hold that one tenant in common can bring an action against another for injury to his interest. 12 *C. B.*, 846.

The tenant in dower here can cut no wood except for use and fencing. Cites 17 *Pick.*, 248.

Haines could have no right to cut down the wood at all.

(McDONALD, J.—Would not the widow have a right to go and live on that place?)

Haines himself swears he thinks there are 75 cords on the land yet. There is just about three years' wood left on the lot, yet it is complained that we have fifty dollars. Cites 7 *Gray*, p. 8.

I concede that the action of waste (pure) is abolished, but another form is instituted in its stead. I framed this action for injury to the reversion of my client.

(WILKINS, J.—The question is whether, irrespective of any form of action, you have a right of action.)

Now whom should we have sued, if not Haines? In tort the plaintiff has the election to sue one or all. I treat this, and the law treats it, as a tort. This is a permanent injury to the reversion.

In the United States where the woodland is set off in the dower with the rest, no wood can be taken but for fencing.

Now I would like the other side to shew the difference between the acts of Haines and those of the widow. She sold Haines all the hardwood timber on the lot for \$90.00. We felt that half that money belonged to us.

It is waste for the tenant in dower to cut down, on what was pasture land when she took it, a second growth that is fit for timber and has grown up since she came on.

The damages are not excessive and we have not even the damages that we were equitably entitled to recover.

If this defendant has been trapped into doing wrong, he must resort to the widow to be reimbursed.

There is no obligation on Haines to keep the field clear and the undergrowth will destroy it for any useful purpose until recleared.

Harrington.—There is no ground of misdirection in the rule. There is no pretence whatever that there was any clearing but in the field as to which the jury found against us.

The Judge left it to the jury to say whether the clearing of the field caused that piece of land to be more valuable than otherwise. The jury say by their verdict under the charge that the acts outside the field were acts of plundering, and they found for \$50 damages.

The right of dower does not extend to the cutting of all

the timber on the estate. She cannot, for instance, sell her estovers, for that would be paying herself in advance. Cites *Clarke v. Holden*.

She might sell all the wood and die next day.

In one case the building of a wall that obstructed an ancient light, was an injury to the reversion; because if the reversioner wanted to sell that day he would get less.

Outside of the field there is no pretence that there was any husbandry. How could there be the intention of husbandry, when it was only the hardwood that was cut? How could that tend to the cultivation of the land?

Can a party, either with or without permission of the tenant in dower, enter and cut down all the trees on the land? That is the question.

See *B. & L.*, 364, as to the action being against *Haines* and not the widow.

Thompson, in reply.—Cites *1 Washburn on R. P.*, 142, 143 also *15 Mass. R.*, 157, where it was decided upon common law principles that the widow was not dowable of wilderness lands at all, for the reason that to clear and cultivate them would be waste. Cites *7 Johnston*, 237.

The fact that this action will not lie against *Haines* is clear. The widow received from *Haines* \$90. They seek to make him pay it again.

The Judge put to the jury that unless they found that there was plundering they must find for defendant.

There was not a tittle of evidence of plundering and yet the jury found for plaintiff. Plundering is entirely distinct from cutting under a contract in which a party has given ample consideration.

(*McDONALD, J.*—Plundering was used in contradistinction to legal acts of husbandry.)

Exactly; the question left was whether the acts were done *bona fide* with a view to husbandry. The cutting of the hardwood has no significance. The question is whether he gave an ample return to the inheritance.

In *Titus v. Sulis* the widow and *Haines* were sued together. That judgment settles that *Haines* cannot be sued. The action

must be against the tenant in dower, who has her recourse against the wrong-doer.

YOUNG, C. J., now (April 2nd, 1877,) delivered the judgment of the Court:—

James Roop, the father, by his first wife, of the female plaintiff, died seven years ago, leaving a second wife as his widow, now the wife of Caleb Sulis, and a son, Christopher, who administered to his estate, consisting of the homestead and three lots of wood land. One of these, containing 200 acres, was divided into three parts, two of which were assigned to the two heirs, and the middle one to the widow as her dower. This dower lot has already figured in this Court in an action for waste against the widow, which failed; and now it appears a second time in this action against the defendant, who paid the widow \$90 for the use of the place during her lifetime, and cut the hardwood on it to a considerable amount, which it was said the widow could not legally empower him to do; and the jury having given the plaintiffs a verdict for \$50, the question is, can they sustain it.

The law upon a point like this, coming for the first time before this Court, we must look for chiefly in the American cases; wild lands, as they are called, being very rare or unknown on the other side of the Atlantic, though abundant on this. They have been subject to a variety of decisions in the Courts of the United States, which are largely reviewed in the text books, particularly *Scribner on Dower*, I., 195, and II., 743, and present some striking analogies. In most of the States a widow is dowable of wild lands, but not in all. The Supreme Court of Massachusetts held that she was so dowable in a case decided in 1788, but took the opposite view in the year 1818, in the case of *Conner v. Shepherd*, 15 *Mass. Rep.*, 157. It was conceded that, by the common law, the widow is dowable of all the real estate of which her husband was seized during the coverture, with some few exceptions inapplicable to this country; but, it was added that the question whether forests, parks, and other property of a similar nature are also exceptions, seemed never to have occurred, probably because there is no instance in Great Britain

of any such property held separately and distinct from improved and cultivated lands. Looking to the large tracts of uncultivated territory owned by individuals who have no intention and no means of improving them so as to yield an income or annual product, the Court thought themselves justified in holding them not dowerable, and the Legislature of Massachusetts confirmed that decision in their Revised Statutes, ch. 60, sec. 12. The same rule prevails in Maine and New Hampshire; but if it would be a wise thing to adopt it in this Province, that is the duty, we think, of the Legislature rather than of this Court.

The right to dower being recognized, the next enquiry is, within what limits is it to be exercised. The widow must not commit waste, but the law of waste must vary and accommodate itself to the circumstances of a wild and unsettled country. One of the American Courts remarks that it would be an outrage on common sense to suppose that the strict English rule is to prevail, and that every thing that would be waste there is to be so accounted here. A reasonable use of the land for the purpose of cultivation, for fuel and for fencing, must be permitted. The doctrine seems to me to be fairly and lucidly put in the case of *Jackson v. Brownson*, 7 Johnson, 227, where the Court held in New York that the legal principle there and in England is the same, but that in the application of it, regard must be had to the situation and circumstances of the two countries, that an irreparable injury must not be done to the reversion, and that the extent to which wood may be cut before the tenant in dower, and, of course, any person claiming under her, becomes guilty of waste, must be left to the sound discretion of a jury, under the direction of the Court. The defendant in the case in hand cut down the hardwood in a field of eight or ten acres, which he fenced and cultivated so as to render it, according to the evidence, of more value than in its original state. For this cutting the jury acquitted him, but he cut a valuable knoll and other trees outside the field, for sale, for which damages were awarded. As the widow, having no means of support, and having the sanction, too, of Christopher, her brother, who was also the administrator, authorized the cut-

ting by Haines, for which he has paid her, we cannot but regard this as a hard action, but the law being with the plaintiffs, we cannot set aside the verdict in their favor, and must discharge the rule for a new trial, with costs.

SOUTHER ET AL. v. WALLACE.

A written promise, signed in Nova Scotia, to pay a certain sum of money in Boston, in United States currency, is a promissory note.

A verdict for plaintiff for \$2670, "with interest," is a verdict on which judgment may be entered up, though the note on which the action was brought, payable in Boston, U.S., specified no rate of interest,—the rate of interest at the place of payment, at the time of the trial, to be ascertained by a Master of the Court.

After a promissory note has been read in evidence it is too late to object to the insufficiency of the stamps.

This was an action to recover the amount of two promissory notes for \$1000 and \$2000, American currency, respectively. The common counts for goods sold, &c., were also added to the declaration, to cover the consideration for the notes. Defendant pleaded never indebted, payment, denial of making of notes, and of presentation, want of stamps, and also a plea setting out that the notes were given to cover the balance of the price of a dredging machine sold by plaintiffs to defendant and one Evans, that the machine was to be capable of doing certain work, but that it could not be made to do the work stipulated, though large sums were spent upon it in repairs.

A plea was also added subsequently, setting out as a defence on equitable grounds, that the defendant had signed the notes in question solely as security for Evans, who was the only person interested in the machine purchased, and that the plaintiffs gave an extension of time to Evans without the knowledge or consent of the defendant, and did not take the necessary and proper steps at the proper time to recover the amount of the notes from Evans. To the plea alleging want

of stamps, plaintiffs replied, by leave, that they were not aware of the law of the Dominion of Canada respecting stamps on promissory notes at the time of taking the notes, being foreigners, residing and doing business in the United States, and that as soon as they became aware that the notes were not sufficiently stamped, they affixed double stamps.

The cause was tried before Mr. Justice WILKINS, at Halifax, in April, 1876, when a verdict was found for plaintiff for \$1670, with interest. A rule *nisi* to set the verdict aside, and for a new trial, was taken out under the Statute and argued before four Judges, January 8, 1877.

Wallace, in support of rule.—The verdict here should have been for the defendant. The notes were drawn in favor of the firm of "John Souther & Co." There is no sufficient proof who composed the firm. There is no sufficient proof that the notes were properly presented for payment. The witness says they were presented, but does not say when or how. The writings declared on were not notes, but simply agreements, because they were payable in American Currency, which is uncertain. *Byles on Bills*, 92, (Lib. ed. p. 146); *30 U. C., Q. B. R.*, 23; *29 U. C., Q. B. R.*, 535. The verdict is bad for uncertainty, because it does not show at what rate the interest was to be computed. The jury cannot give any rate of interest they choose. The jury should have been instructed that the interest due on the notes must be computed at the rate in Boston, where the notes were payable, and proof of that rate should have been given; *9 Exch.*, 25; *Story's Conflict of Laws*, 304, 307; *Byles on Bills*, 466; *2 B. & Ald.*, 308; *2 Campb.*, 296. Our own statute says the jury may give any rate of interest, not exceeding six per cent. The writ only claims three thousand dollars damages, and if interest at six per cent. were added to the value of the notes so found, the sum would exceed the amount claimed. The learned Judge rejected a copy of the agreement submitted by defendant and received it when afterwards submitted by plaintiffs. One or the other was improper. The fact that the plaintiffs were foreigners is no reason why they should not have known the law and the defective stamping of the notes. It was not proved that they

were all ignorant on that point. *36 U. C. Q. B. R.*, 1. The learned Judge misdirected the jury on several particulars which he has not included in his written report of the charge. The learned Judge refused to allow a continuance or postponement of the case, though a most material witness, Evans, was out of the Province, and I was informed for the first time on the very day of the trial, when it was too late to instruct new Counsel, that the Counsel I had retained, had been previously retained, through his partner, by plaintiffs' Attorney. The Judge misdirected the jury in several particulars; he directed the jury to find a verdict for the plaintiffs, leaving nothing to them. *Hilliard on New Trials*, 254, and following pages; *4 T. R.*, 758. His report says he "remarked upon the pleas," but does not shew what he told the jury respecting them. It must be taken that he misdirected the jury, from the fact that he does not report what directions he did give them. *36 Eng. L. & E. R.*, 431.

Meagher, contra.—Wallace's interest in the dredge commenced, on his own evidence, before the writ was issued. The plea that Wallace was merely a surety was not pleaded till two years after the writ issued, and a few days before trial. The plaintiffs proved that the machine worked well. The evidence as to presentment is that "the notes were presented at plaintiffs' office and dishonoured," which is sufficiently clear, unless explained away on cross-examination, which was not done. It is in evidence that Wallace's name was on drafts, etc., previously given for the same debt, and it is not proved that he signed these notes as surety. It is in evidence that defendant conducted the whole business, that he asked to be allowed to renew notes, and to pay money on account of the transaction. The only evidence of time being given to Evans is not sufficient to release the defendant, as it merely amounts to this, that the plaintiffs did not press him. As to the objection that the notes declared on are not notes, because payable in American currency, that should have been ground of demurrer, and is not a good objection; *Chitty on Bills*, (8 Ed.) 153; *Byles on Bills*, 580. As to stamps, it is questionable whether it was necessary at all to stamp these notes to be paid in Boston; the defendants, foreigners, are not to be prejudiced.

7 Hurlst. & Norm. 60. As to interest, the case cited, 9 *Exch.*, 25, shews that interest is to be computed at the rate chargeable in the place where the note is made. If plaintiffs' replication is not good, defendant should have demurred. The evidence under it was received without objection. *Byles on Bills*, sec. 116. The learned Judge put certain questions to the jury in writing, which were returned by the jury.

(*Wallace*.—I object that these questions are not in the Judge's report, and cannot be considered by the Court.)

Meagher.—There is no proof that the giving of time to Evans was without Wallace's consent. The defendant's story as to his suretyship was so improbable that the jury were justified in disbelieving it. The complaints that no continuance or postponement was granted are not to be considered here.

Thompson, in reply.—Cites 9 *Johns.* 190, 194; 5 *Powell*, 106; *Hilliard on New Trials*, 412. The question is not whether evidence that has been received was material, but whether it influenced the jury. *Taylor on Evid.*, sec. 1493. 1489. As to stamps, see 33 *U. C. Q. B.*, 22; 25 *U. C. Q. B.*, 184. There is a variance between the notes and the declaration, and if it may be held that the notes payable in Boston, "in currency," were payable in Dominion currency, then the variance is all the more important; the declaration alleges that they were payable in United States currency. *Byles on Bills*, 396. The letters to Evans, tendered by the defendant and rejected, would have proved that Evans was the sole principal and treated as such by plaintiffs. 6 *T. R.*, 414, as to stamps; 4 *T. R.*, 466.

SMITH, J., now (April 2nd, 1877,) delivered the judgment of the Court:—

This is an action brought upon two joint and several promissory notes, dated the 15th October, 1873, made by the defendant and one Thomas Evans, by which they promised to pay to the order of the plaintiffs, at their office in Boston, in the United States, the respective sums of \$1000 and \$2000, United States currency. It was tried before Mr. Justice

WILKINS at Halifax, and a verdict given for the plaintiffs for \$2670, with interest. A rule *nisi*, embodying sixteen grounds and extending over a sheet of foolscap paper, was taken out under the Statute, to set said verdict aside, which was argued before the Court in *Banc* on the 8th of Jany. last.

The grounds taken at the argument, and which I think are the only ones necessary to consider, were,—

1. That there was no proof of the partnership of the plaintiffs.
2. That the notes declared on had not the character of promissory notes, but were merely agreements.
3. Rate of interest not found by the jury.
4. That the question of suretyship raised by defendants' added plea was not left by the learned Judge to the jury.
5. If the notes declared on could be held to be promissory notes, they were not properly stamped.
6. The improper rejection of evidence by the Judge.

I think, with reference to the first point, that there is sufficient evidence of the partnership of the plaintiffs, if such were necessary to be proved, but the case of *Allen et al v. McNaughton*, 4 Allen, N. B., 234, clearly establishes that such proof was unnecessary. The second point raises a much more important question, touching the character of the instruments declared upon, for if they are simply agreements, as contended by the defendant's counsel, there might be some weight in the contention of their being without consideration on the face of them. I cannot, however, upon reviewing the authorities on the subject, come to this conclusion. The cases cited do not sustain the position. Nothing can be clearer or more indisputable than that a promise to pay a certain sum of money in "good East India Bonds," or in "cash or Bank of England notes," or "foreign bills," or in "current bank notes," is not a good promissory note. (See *Story on Promissory Notes*, sec. 18.) So must the promise be one to pay money only. But the same author, in sec. 17, says, "provided the note be for the payment of money only, it is wholly immaterial in the money or currency of what country it is made payable. It may be made payable in the money or currency of England, or France, or Spain, or Holland, or Italy, or of any other

country;" and *Clarke on Bills of Exchange*, p. 81, lays down the same principle, and adds: "A note made in New Brunswick, payable there in United States currency, is a promissory note, and may be recovered upon as such."

Although there does appear to have been some evidence wanting to establish the rate of interest which the jury were entitled to give by way of damages, the notes being payable in Boston, and no contract as to interest appearing on the face of them, yet I must presume that the learned Judge, with whom the duty lay of instructing the jury with regard to the legal principles by which they were to be governed, did thus instruct them, and I can see no difficulty in a judgment being entered for plaintiffs for interest within the scope of their claim in the declaration, the legal rate thereof at Boston, at the time of the trial, to be referred to a Master of the Supreme Court to ascertain.

The fourth ground I have noted, viz: that the question of the defendants' suretyship was not submitted to the jury, I think presents no difficulty. I cannot gather from the learned Judge's charge whether he addressed them especially upon this point, but we find that he put to them three written questions, which we are informed were answered favorably to the plaintiffs, one of which was as follows:—"Was Wallace when he gave the notes in question a mere surety for Evans, and had he no interest in the machinery?" This question was important, inasmuch as it was an essential fact to be established by the defendant in connection with his first added plea, in which he asserts his connection with said promissory notes to have been as surety for Evans only, and that plaintiff gave to Evans time to pay the same, and thereby discharged him (Wallace) from all liability. If, indeed, the learned Judge had omitted to put this question to the jury, I fail to see how it could have affected the result, as on a careful perusal of the evidence I can find no proof of such time having been given to Evans as would operate as a release in law of the defendant, although he might have signed the notes for the accommodation of Evans, and have done so within the knowledge of the plaintiffs. *Story on Promissory Notes*, sec. 413, lays it down that "if there be a valid agreement,

(that is, one founded on a valuable consideration and operative in point of law,) between the maker and the holder, whereby the holder agrees to give credit to the maker of the note after it is due, or whereby the payment is postponed to a future day, as this agreement is made without the consent of the endorsers, they will therefore be absolved from all obligation to pay the debt ;" and in sec. 415 I find it stated by the same author that, "if the agreement be without any consideration, there the agreement will not operate as a discharge of the endorsers." And in the case of *Philpot v. Briant*, 4 Bing., 717, 719, 721, BEST, C. J., said "the time of payment must be given, by a contract binding on the holder of the bill ; a contract without consideration is not binding on him ; the delay in suing under such a contract is gratuitous ; notwithstanding such contract he may proceed against the acceptor, when he pleases, or receive the amount of the bill from the drawer or endorser." In the light, therefore, of these authorities, I can find nothing in the evidence given at the trial which would release the defendant, although he were a mere surety for Evans, from his liability on the notes, as he contended for.

The fifth ground I have mentioned as urged upon the Court at the argument, with reference to the insufficiency of the stamps, I apprehend to be also untenable. Beyond doubt the notes in question only became such in effect, and by operation of law, when they were received by the plaintiffs in Boston ; *vide Chapman v. Cottrel*, 3 H. & C., 865. They were likewise made payable there, and consequently are governed by the law of that country. It is true, as a general rule of the common law, that contracts are to be deemed such in reference to the place where they are made, but not when they are positively to be performed, or paid, elsewhere. *Story on Promissory Notes*, sec. 165, says, "when the contract is, either expressly or tacitly, to be performed in any other place, then the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." The same author recognizes the doctrine in his work on *Conflict of*

Laws, sec. 280. *Don v. Lippmann*, 5 Cl. & Fin., 1, 13, 19, is also a case in point; and in the 9th edition of *Chitty on Contracts*, p. 91, it is laid down, "that contracts are also to be considered according to the place where they are to be executed;" and he cites *Robinson v. Bland*, 1 W. Bl., 256, 259, and *Gibbs v. Freemont*, 9 Exch., 25. In *Rothschild v. Currie*, 1 Q. B., 45, it was held that a bill of exchange payable in France was a foreign bill, although it was actually made in England, and was governed by the laws of France. The authority of this case has been questioned as irreconcilable with the decision of the Privy Council in *Allen v. Kemble*, 6 Moore, P. C. C., 314, but in *Hirschfeld v. Smith*, L. R., 1 C. P., 340, the law laid down in the former case was adopted, and it is fully recognized in *Byles on Bills*, p. 396. With this law before me, I can come to no other conclusion than that the learned Judge was right in the view he took of the objection to the sufficiency of the stamps. There is another difficulty which, to my mind, besets the defendant in reference to this portion of his defence. It is a clear rule in England that an objection to the want or insufficiency of the stamps must be taken at the earliest possible moment; *Roscoe's N. P.*, (13th Ed., 244. "The rule is," says that author, "that after proof of the due execution of an instrument, it lies on the opponent to point out any objection to the stamp;" and also, at the same page, it is stated that, "the objection must be made before the paper is read in evidence." And *vide Foss v. Wagner*, 7 Ad. & El., 116; *Robinson v. Lord Vernon*, 7 C. B., N. S., 235, and *Tilsey on Stamp Laws*, 320. The minutes in this case show that the notes were read before the objection to the sufficiency of the stamps was raised, and therefore it was too late, according to these authorities and the decisions of our own Court.

I cannot but regard the finding of the jury, upon the questions submitted to them, as conclusive against the defendant and justified by the evidence, and, as I am bound to take the learned Judge's charge as correctly reported by him, I do not see any reason for disturbing the verdict, either on the ground of misdirection or of the improper rejection of evidence. I think, therefore, the rule to set aside the verdict must be discharged.

SMITH v. THE INTERCOLONIAL COAL MINING CO.

Where plaintiff was injured by an explosion of gas in defendant Company's mine, occasioned by an erroneous plan of the workings, but it was not proved that the Company had employed incompetent men to superintend the mining, and plaintiff was not employed under any special agreement,

Held, that he could not maintain an action against the Company for the injury.

This was an action by a workman for injuries caused by an explosion of gas in the pit. The defence principally relied on was that the injury was sustained at the hands of a fellow workman, and that the defendants were not responsible.

The cause was tried before Mr. Justice SMITH, at Pictou, and a verdict found for the plaintiff, damages, \$100.

A rule to set the verdict aside on the grounds of misdirection, that it was against law and evidence, and on the grounds taken at the trial on motion for non-suit, was argued in January, 1877.

Rigby, Q. C., in support of rule.—The whole question turns upon the legal principle that the master is not liable to his servant for damages resulting from the acts of fellow servants.

The only question put by the Judge was whether Mr. Simpson, the manager, did not stand as it were in the place of the Company. That was a misdirection.

All the Company had to do was to get a competent man.

(YOUNG, C. J.—There can be no doubt that all these were competent men.)

The Company sent to Scotland to get a specially qualified man in view of the recent accident.

Simpson swore that he had no interest in the Company at all. He also knew Dunn, who was a competent manager. Purvis also, the underground foreman, was a competent man.

(DESBARRES, J.—They were all competent men, acting on an improper plan. Who was responsible for that plan?)

It is probable that it was made by Dunn himself, with the assistance of Robinson.

In the new openings they assumed that the plan was right. It was necessary for them to open the new shafts as early as possible. It would have taken years for the gas to get out of

the old slope in the natural way. Mr. Simpson took the prudent plan of opening a new slope, intending to lower it into the old one, and relying on the plan that he found. Cites *Campbell v. Gen. Mining Ass'n*; *Albro v. Coal Co.*; 6 *Cush.*, 75; 16 *C. B., N. S.*, 669; *L. R.*, 2 *Q. B.*, 33; *L. R.*, 1 *H. L.*, *Scotch*, 326; *L. R.*, 10 *Q. B.*, 62.

The cases cited establish the fact that Simpson was here the fellow servant of the plaintiff, within the meaning of the rule stated. The distinction attempted between the manager as vice-principal and the other workmen is destroyed by these cases.

Graham, contra.—It is admitted that there is negligence, and it is immaterial whether it is that of Simpson or of the Company. There was no doubt about negligence in the case of the "Atlantic." Negligence is perfectly consistent with innocence. Ignorance of the circumstances and consequences is not a sufficient justification.

If Simpson is not negligent, then who is?

There is negligence on the part of the defendant Company.

If the plan could have been traced into Dunn's hands, it might be then considered that the negligence was that of a fellow workman.

The Company cannot escape by saying they had a wrong plan, a plan made by themselves and which they had adopted.

The jury found that Simpson was guilty of negligence in not having a proper plan; i. e., that the Company had not a proper plan, for the wording is immaterial. They were guilty of negligence in having this incorrect plan, which was in the hands of their Vice-President. The Vice-President handed that plan to Mr. Simpson, and he went by it. That is, therefore, the negligence of the Company.

(WILKINS, J.—Would the plaintiff, if suspecting danger and desiring to guard against it, have referred to this plan? That is a material consideration.)

Cases have been cited by Mr. Rigby of the Superintendent, Engineer, Manager, with particular duties, &c. But there must be a limit. If he has the power of employing and discharging servants, he is not a fellow laborer. *Sherman &*

Redfield on Negligence, sec. 103; *Ib.*, sec. 89. Cites *Engley v. McIlreith*. The position of the manager here is essentially different from that of the parties under the English decisions. He has greater powers. He is an agent.

The Nova Scotia case, *Campbell v. The Gen. Mining Ass'n Co.*, is not this case at all. The difference is between a foreman and a manager.

(WILKINS, J.—Should the workmen have used the safety lamps?)

There was no gas in number 4 where plaintiff was working, and lamps were not needed and were not used. The duty of determining the use of the safety lamp is that of the underground manager.

If a Company can get out by saying that they had a plan in their possession, made by themselves, which was defective, no Company could be held liable; *Smith's Master and Servant*, 208.

There is evidence to show that the men in the new pit heard the shots and the boxes running in the old one, which showed that they were pretty near, and should have put the manager on his guard.

(WILKINS, J.—If you can show that this plan was drawn by an incompetent person, as may be argued from the evidence of Simpson, then you attach a liability to the Company.

MCDONALD, J.—It is for the defendants to prove that the plan was made by Simpson, a fellow servant, as that is their defence.)

The servant undertakes the risk of all ordinary accidents, but this is extraordinary and not to be anticipated; *Smith's Master and Servant*, 212, 205.

Henry.—The incompetency may be judged of by the event. The plan has absolutely misrepresented the position of the works. It is not a plan made all at the same time. It is equivalent to entries in a book. It is the only guide they have to prevent explosions. It is testified that this is a very extraordinary variation.

This plan is not to be attributable to any particular engineer. It is in the office of the Company, and it is the duty

of the manager, or of him who has the supreme control of the works, to provide a plan. It is the work of the Company.

Is not the fact of the gross incorrectness of the plan an evidence of incompetence?

The Vice-President takes this plan, which has nothing about it to authenticate it, and gives it to Mr. Simpson to work the mine on. There is nothing to show that any steps were taken to ascertain whether the plan was correct or not. The Company has two duties to perform; to provide suitable outfit and machinery, and also, to provide suitable workmen. The plan, which is a part of the outfit of the mine, is proved to be absolutely incorrect.

Rigby, Q. C., in reply—Refers to *Sherman & Redfield*. The American doctrine, except in Massachusetts, does not go nearly as far as the English cases. The contrary rule prevails in Massachusetts. The text and note show that the *dictum* relied upon is not English law. The distinction in favor of the plaintiff in the case of negligence of a manager is not sustained by the English cases. Compare *Sherman & Redfield*, 103, cited contra, with *Howells v. London Steel Co.*, L. R., 10 Q. B., 65, to show the entire distinction between the American and the English principle as to the manager or vice-principal being a fellow servant.

The jury find that the negligence is that of Mr. Simpson, and that is the only question. The fact of a plan being handed to Simpson by Mr. Budden has nothing strictly to do with the matter according to the verdict. The sole question under the verdict is whether Simpson is competent, of which there is abundant proof.

If we have to go upon the plan there is evidence as to where it came from. It was made by Mr. Dunn, as stated to Simpson by the Vice-President.

The only point is whether Simpson is such a fellow servant that the Company are exempt. The jury have put the negligence upon Simpson and the verdict therefore cannot stand.

WILKINS, J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

The plaintiff, whose sufferings in body and purse for an ac-

cident that occurred while he was employed as a servant in defendants' coal-mines, I sincerely regret and commiserate, obtained a verdict with \$100 damages against the defendant company in a cause that was tried before my brother SMITH, at Pictou. It is sought to be set aside, among other grounds not necessary to be referred to, because it was against law and evidence. The plaintiff does not appear to have been guilty of any negligence or other default whatever, still less of any such that conduced to the disaster,—escape, ignition and explosion of gas,—while he was engaged in the faultless performance of the perilous duties of his station. He worked, however, under no special contract with the defendant company, and not otherwise than as a servant retained and employed by managers of the company, who, although superior to himself and he subordinate to them, were in the eye of the law his fellow servants. The case presents, in my opinion, strong grounds for believing that a predecessor of him who was the Manager of the Mines at the time of the accident, who himself fell a sad victim to an explosion at these same mines, and would appear to have been thoroughly competent to perform the work for which he was employed, had nevertheless failed in the exercise of skill in a particular discharge of his duty, which failure, in its results, conduced to the catastrophe. That, I say, might be inferred from the evidence. It would be too much to say that it could be conclusively inferred from the testimony. But assume such to have been the fact, or that want of skill, or of prudence, or of judicious protecting management were proved to have existed on the part of any servant of the Company, high or low, that tended to bring about the injury sustained by the plaintiff, the verdict cannot be sustained so long as *Wilson v. Merry*, 1 H. L. Sc., 326, decided by the highest tribunal in England, furnishes the rule of law to govern such a case as this. It embraces this case within its principles and almost in terms provides for the decision of it. As the Company is not proved to have selected for the management of its affairs any person under whom plaintiff worked who was incompetent for what he assumed to perform, and as this plaintiff is not employed under any special agreement made between him and the Company directly; the

verdict must be set aside and the rule be made absolute, in the usual way with costs.

YOUNG, C. J., expressed a strong opinion that Companies in such cases should be liable.

GIDNEY ET AL. v. TITUS.

One J. R., an old man, with a wife and daughter, both wholly, or nearly, blind, and two infant children, being unable to support himself and family, conveyed all his property, real and personal, except a few sheep, to the plaintiffs, his son and son-in-law, on condition of their supporting himself and family. The defendant, who was at the time of the making of this assignment, a creditor for a small amount, obtained a judgment and took under execution a pair of oxen included in this assignment. To plaintiff's action of trover defendant pleaded fraud, and the jury, having had the question of fraud fairly put to them at the trial, found for plaintiffs, negativing fraud.

Held, that the verdict could not be disturbed.

This was an action of trover, tried at Digby, in September, 1876, before Mr. Justice McDONALD. The action was brought to recover damages for a pair of oxen seized by the defendant and sold under an execution in a suit brought by the defendant against one James Robinson. The defence relied upon was that Robinson, being indebted to the defendant, had fraudulently assigned all the goods to the plaintiffs. The jury found for the plaintiffs, and a rule *nisi* to set the verdict aside was argued during the term of 1876-7.

Thompson, in support of rule.—Although the verdict of the jury is against us, yet we contend that there was fraud on the part of plaintiff here, on his own evidence. Cites *1 Smith's L. C.*, *Twyne's case*, notes.

Harrington, contra. *Twyne's case* only goes so far as to shew that these circumstances are a badge of fraud, to be left to the jury. The defendant reserved enough to pay this debt. He could have set up all this property at auction and disposed of the money. There certainly was consideration for the transfer in the agreement of the assignee to support, not the old man, though over 70 years of age, but his blind family.

YOUNG, C. J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

The plaintiffs, the son and son-in-law of James Robinson, an old man, with a wife and daughter, both nearly or wholly blind, and two infant children, whom he was unable to support, agreed to move into his house and maintain the family upon the father making over to them all he possessed, which he did, by deed and delivery. This was held by the jury, after a charge, to which no exception could be taken, to be a fair and honest transaction, although it defeated a creditor for a small amount, who afterwards obtained a judgment and sold a pair of oxen that had been delivered to the plaintiffs. The defendant's counsel insisted that all the badges of fraud in Twyne's case were here, and certainly, so clean a sweep, although the value was but little, is a dangerous precedent. But the point is, what are we to say to a verdict with a jury duly warned and instructed, and the Judge approving of their decision? Modern verdicts have disregarded every one of the badges of fraud in succession, and been upheld. *May*, in his treatise on the statutes of Elizabeth, fol. 106, says truly, "Each case has to be decided pretty much on its own merits, and on the opinion of the Court or jury on the particular circumstances." The note to *Martindale et al. v. Booth*, 3 B. & Ad., 498, which I looked upon as a pole star during the last twenty years of my own practice, shows the gradual modifications of the old rule. Continued possession was no longer held conclusive. Secrecy, it was said, was a great badge of fraud, but no conclusive proof. The whole matter, said Lord TENTERDEN, of possession, is to be left to the jury as a question of good or bad faith. For these reasons, and not because a few sheep were reserved, or the debt was small, I concur with my learned brethren, though with some misgivings, in discharging the rule for a new trial.

IN RE A. MOONEY. INSOLVENT.

Where an insolvent had not kept an account book showing his receipts and disbursements of cash, and the Judge of the County Court granted him a discharge of the second class, suspending it for four months; on appeal, the discharge was confirmed, but suspended for an additional period of four months.

WILKINS, J., dissenting, held that sec. 101 of the Insolvent Act of 1869 made it imperative on the Court to refuse the discharge.

This was an appeal from a decision of JOHNSTONE, Judge in Insolvency, suspending the discharge of Andrew Mooney, an insolvent, for four months, and making it of the second class. The appeal was taken out by creditors, who contended that the insolvent was not entitled to a discharge at all, on the ground of no proper books being kept and of reckless dealing.

Rigby, Q. C., in support of appeal.—As to the question of books, quotes sec. 101, Insolvent Act of 1869, also sec. 105; *Bump on Bankruptcy*, 610. Considering his position, insolvent dealt largely in notes and had a large bank account. His books are the only thing to show the state of his business, and these he does not keep. A suspension of his discharge for two or three months is no punishment.

The two objecting creditors swear in effect that the judgment to Duffus was fraudulent. This was not contradicted by the insolvent, and Duffus was not called. The Judge assumed that the judgment was satisfactory.

Sutherland, contra.—With regard to the books, books were kept sufficient for the business. A bank book was produced, showing the amount paid out, and for what. As to authority to suspend discharge, cites sec. 103 of the Act of 1869. As to books, cites *In re Hodser*, 3 DeG., McN. & G., 554-555; *Bump on Bankruptcy*, 624-625. The judgment to Duffus was given in February, under pressure, and the assignment was not made until August. No large amount of pressure is necessary; it is enough to ask; *Campbell v. Barry*, 31 U. C., Q. B., 293; also another case on p. 295; *In re Wallace*, 9 U. C., Q. B., 313. Duffus was in England when Mooney went

up for discharge, and consequently could not be examined; cites *In re Brown*, DeG. & J., 73.

Rigby, Q. C., in reply.—The evidence is sufficient to require an absolute refusal of discharge under sec. 101. If sec. 101 is not complied with, it is imperative that the discharge be refused. A book must be kept *showing receipts and expenditures*. The sec. 103 only applies where *such a book has been kept*, but is kept negligently. Here there was no such book, and there can be no discretion.

YOUNG, C. J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

The insolvent, on applying to the County Court at Halifax, was opposed, and on his examination and that of his opposing creditors, Richardson and Mason, the Judge granted him a discharge of the second class and suspended its operation for four months, which have just expired. From this sentence there is an appeal, as being too lenient.

He was a builder on speculation, and made an assignment on the 30th August, 1875, just before the new Act came into operation. His real estate he valued as worth \$9500 over and above the mortgages on it, five in number, amounting to \$18,300. About \$12,000 of this sum was owing to *Mr. James Duffus*, and on a foreclosure we may infer that a large balance was still due, for, on the 25th February, 1875, he gave *Mr. Duffus* a confession of judgment for \$6131.82, due for land and lumber, which has been settled or paid, *Mr. Duffus* having resumed possession of the land. This judgment was assailed as a fraudulent preference, and it was also objected that the insolvent dabbled largely in accommodation paper. This last objection, sound as it is in itself, comes with an ill grace from Richardson and Mason, who had \$6000 to \$8000 worth of that same paper; and both parties having been closely examined before the Judge, and the alleged fraud having been explained to his satisfaction, we are not disposed to set aside the decree on these points.

The main objection was to the insolvent's book-keeping, and as the Acts of 1869 and 1875 are alike on this head, we

quote from the 56th and 57th section of the latter Act. By the 56th, "the insolvent shall not be entitled to his discharge if," among other things, "he has not kept an account book showing his receipts and disbursements of cash, and such other books of account as are suitable for his trade," words borrowed from the 92nd sec., sub-sec. 6, of the Ontario Insolvent Act of 1864, and which I have not been able to trace further back to their source. They are not derived either from the English or American legislation. By the 57th section of the Act, one of the offences bringing the insolvent within it is, "negligence in keeping his books and accounts," which the Judge, in this case, has very properly imputed to Mooney. But the applicants say,—this is not enough, he has admitted that he kept no cash book, and under the 56th section he can have no discharge. This is a very serious question, for I am afraid that many of our traders and merchants fail, imprudently and unwisely fail, as I readily admit, in keeping a cash book, and, if so, it is contended that they are shut out from the benefit of the Act. The Bankrupt Law of 1867 in the United States sec. 29, enacts that, "no discharge shall be granted, or if granted, shall be valid, if, *inter alia*, being a merchant or tradesman, the bankrupt has not, subsequently to the passing of this Act, kept proper books of account;" and a multitude of decisions on this clause is to be found in *Bump's* treatise, fol. 623-4, in *Lowell's Decisions*, and in *Wotherspoon's* notes on the 56th section of the Act of 1875. I am surprised at the severity of some of these decisions, where proper books are not kept. "No excuse," it is said, "however true, and no innocence of intention, will avail to supply the deficiency. A cash account is necessary to the understanding of a trader's business, and when one has not been kept, a discharge will be refused." Judge LOWELL, in *re George and Procter*, 50, observes that the statute has imposed a wise and salutary rule applied to merchants dealing in large sums and contracting large debts. Another case decides that whether the books of account are properly kept is a question that must be determined in each case upon the facts as they appear, and not upon any strict rule that such and such books and such and such entries are essential in all cases. A rule

of this flexible character, permissible under the American Act, appears to me much more rational than a cast iron and inflexible interpretation of ours.

The English Bankrupt Acts contain no such clause as either the Dominion or the American, and the decisions are more liberal, and, as I think, better guarded. *In re Lewis*, in 1860, 3 L. T. R., N. S., 27, the Commissioner laid down as a rule, that where the books are not properly kept, and more especially where there is not a cash book, there cannot be an immediate certificate,—and he granted one of the second class, with suspension for a month only, in consideration of the special circumstances. In *Ex parte Glass*, in 1862, 6 L. T. R., N. S., 407, Lord Justice KNIGHT, in remarking on section 159 of the Act of 1861, observes that the offence at which the section points is not the bankrupt's omitting to keep books of account, but his omitting to do so with intent to conceal the true state of his affairs. In the two cases cited at the argument, *In re Hodgson*, in 1853, 3 DeG., M. & G., 547, where the bankrupt, a trader, had kept no regular accounts, he was awarded a certificate of the second class, with suspension for twelve months, the limited nature of his business affording him some excuse. *In re Brown*, in 1858, 3 DeG. & J., 373, the bankrupt was convicted of a course of dealing in accommodation bills, with extravagant expenditure, reckless trading, and bad book-keeping; still, he was awarded a certificate, with suspension for three years, and no protection for the same period, which last, being so severe a sentence, the court of appeal reduced to three months.

It will be seen that in none of these cases, and in no case that has been cited under the Ontario or Dominion Acts, has a discharge been refused for want of proper books, or of a cash book, and as the 56th section is so stringent, we are unwilling to make this insolvent, who has been as much sinned against as sinning, the first victim of the Dominion law. But, as he acknowledges that he kept no account books showing his receipts and disbursements of cash, nor any other except his jobbing and bank books,—a practice highly reprehensible,—while we confirm his discharge of the second class, we suspend its operation for a further period of four months, to be computed from the 21st of March.

WILKINS, J., said.—As I read section 101 and section 103 of the Insolvent Act of 1869, the former appears to me *imperative* on the learned Judge, in the state of facts before him as proved, *to refuse the discharge*, whereas a *discretion* is given to him by section 103 to punish within the limits stated in the latter section if the case be brought within its provisions.

McDONALD, J., said he read the two sections, 101 and 103, together.

SMITH, J., concurred in the judgment of the learned Chief Justice.

JOHNSON ET AL V. LITHGOW ET AL.

M. sued L. & F. as joint contractors. L. died, and his executors were substituted on the record. M. died, and his executors were substituted. At the trial it appeared that J. had been a partner and co-contractor with M., and his name was added. The writ was amended by adding J.'s name, and the cause went to trial as *Executors of M., and J. v. Executors of L., and F.*, and the jury found a verdict for \$351 in favor of J., as surviving partner of M.

Held, that after verdict, the Court could not amend the writ by expunging the names of the executors of M., and adding to the name of J. the words, "as surviving partner of M."

Held, also, (by WILKINS, J.) that, where one of the originals of an agreement between defendants, L & F., had been in the possession of L., and no evidence was given of a search by or with L.'s Executors, or among the papers of the deceased for it, secondary evidence of the agreement had been improperly received.

WILKINS, J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

This cause appears to have been partially tried before that trial of it which is under our review. The action was originally brought by Malcolm against Lithgow and French. Lithgow died, and his executors were substituted on the record. Malcolm died, and his executors occupied his place. The cause went to trial, when, it appearing from the evidence that the present plaintiff, Johnson, had been a partner with Malcolm, and a co-contractor with him, plaintiff obtained a rule to amend the declaration "by adding the name of Johnson as one of the plaintiffs in the cause." The writ does not ap-

pear to have been actually amended, nor were the pleadings altered after the rule to amend was filed. The cause proceeded, after adjournment of the first, to the last trial, which, although the plaintiffs were the executors of Malcolm and Johnston,—not *Johnston as surviving partner of Malcolm, deceased*, resulted in a verdict for \$651 in favor of Johnston, as surviving partner of Malcolm. At the trial it became essential to prove an agreement between Lithgow and French, and of it secondary evidence was given after an objection of insufficiency of search to warrant its introduction. The jury were satisfied that there had been a partnership between the defendant, French, who made default, and Lithgow, who afterwards died. Defendants' counsel, for grounds of non-suit, insisted on insufficiency of search,—no proof of partnership,—that action was not maintainable in the name of the executors of Malcolm, and Johnston, his partner, who survived him—that Johnston could not recover, as he had not sued *as surviving partner*. The Judge expressed an opinion that the last ground ought to prevail; but the case went to the jury. Assuming the agreement spoken of to have been properly in evidence, the verdict would seem to be morally right, and one that we would gladly sustain if we could. But it appears to me quite impossible on principle to uphold it. The right of action which Johnston and Malcolm once had conjointly, survived to Johnston at the decease of the former. Johnston, of course, then should have sued as surviving partner of the partners, Malcolm and Johnston. This Court has absolutely no right now to expunge from the record the names of those two persons who are on it now, as executors of Malcolm, and after having done that, to add to Johnston's name the words, as surviving partner of the late partnership of Malcolm and Johnston. At the argument, (written in this case,) an enactment in the third series, corresponding with section 94 of chapter 94 in the present Revised Statutes, was relied on, but in vain, because it clearly does not meet the case. In any possible view of it, it does not give this Court now, after trial and verdict, power to strike out the executors—still less to add words necessary to show the only character in which Johnston could sue. I regret

very much that the plaintiffs' counsel at the trial overlooked, (for I think they must have done so), the 98th section of the present statute, which was on the statute book at the trial in the existing words. The Judge, if appealed to under that, by motion founded on an affidavit of the executors of Malcolm, attesting their consent in writing to be struck out, in my opinion could, and I think he would, have struck them out, and under the amendment provision have added the necessary words to the name of *Johnston*. I do not think that the words, "*originally* joined," occurring in the last mentioned section, would have influenced him to refuse the application. What the Judge might have done *then*, however, we cannot do *now*. It is obviously essential for future protection of the defendants against a possible renewal by *Johnston* of his claim, after recovering in this action, that the record should show, as it will not show, in what right *Johnston* recovered and obtained judgment in the present action. The mere language of the verdict will not show that, so as to make the judgment operate hereafter by way of estoppel. As already shown, objection of insufficiency of evidence of search to warrant introduction of a copy of the original agreement as evidence, was taken as a ground of nonsuit. It is also taken under the rule. I am of opinion that the objection must be held available,—and on this ground, viz.: It was proved that one of the originals was in the hands of Lithgow, who had died before the trial. The law presumes that it passed into the hands of his executors, who were defendants at the trial. Neither of them was examined on the point, nor was any evidence given of a search made by or with them, or either of them, or among the papers left by the deceased. I think the rule must be made absolute.

McDONALD, J., read the following opinion:—

If the only question in this case had been whether or not the record ought to have been amended before the verdict, by striking out the names of the executors, I think that the plaintiff would be entitled to our judgment, as ch. 94, sec. 94, Revised Statutes, without requiring any such amendment to be made, provides that at the trial, the plaintiff or plaintiffs en-

titled may recover, though too many have joined as such in the action, but I cannot find any authority which enables us at this stage to amend the record so as to enter judgment in favor of the plaintiff in a different character from that in which he appears now on the record, and in which he tried his cause.

We are asked not only to amend the record, but also to amend the verdict of the jury, who found in favor of the plaintiff, Johnston, not as survivor of another who had a joint interest with him, but in his own individual right.

At the first trial the plaintiff got leave to amend by adding Mr. Johnston's name, as plaintiff, on payment of costs and a continuance of the cause, and the rule was taken to add that name, not as survivor, but simply as *John H. Johnston*.

We cannot amend the proceedings now, as we are asked to do, without amending this rule also, with no condition whatever, and I do not think that we can legally make all these amendments at this stage of the case.

This being my opinion, I do not feel called upon to decide whether or not the search for the original agreement was sufficient to justify the reception of secondary evidence.

The rule must be made absolute.

O'DONNELL v. CONFEDERATION LIFE INS. CO.

The agent of a Life Insurance Company is not competent to give evidence on behalf of such Company of any statements or acknowledgements of the deceased insured in an action by his executor or administrator against such Company, under ch. 96, R. S., sec. 41.

WILKINS, J., dissenting.

This was an action on a policy of life insurance, tried before SIR W. YOUNG, C. J., in which a verdict was found for plaintiff. A rule *nisi* to set aside the verdict was argued before RITCHIE, McCULLY, and SMITH, JJ., and reargued before SIR W. YOUNG, C. J., DESBARRES, WILKINS, and SMITH, JJ.

McDonald, Q. C., in support of rule.—The first point is the rejection of Allison's evidence. If the rejection of that was

wrong, the verdict must go. It was rejected under sec. 41 of the Evidence Act. He was called to testify to communications and transactions between himself and deceased as to premium, but the evidence was not admitted. Allison was merely an agent of defendants. The American cases, *the statute being essentially the same*, allow the agent to testify; cites *2 Mass. Dig.*, 837; *15 Gray*, 561; *5 Allen*, 157. The policy was never delivered; *May*, 57, 58; *103 Massachusetts Rep.*, 78; *Bliss on Life Ins.*, 247. There never was in the mind of either the intent to effect an insurance. The premium was never paid, and the policy was never countersigned by the agent. The premium was never tendered till after the death of the insured. The only evidence is that of the father, who saw the policy in the son's drawer after his death. *Bliss*, 244; *Ib*, 510.

It may be said that the provision as to countersigning is not a part of the policy. The policy makes the conditions a part of the policy. (DESBARRES, J.—That refers to the conditions on the back.) The condition I refer to is in the body of the policy and covered by the seal.

The receipt in the policy would bind the Company if there was delivery, but the question as to the effect of the receipt cannot avail, as there was, as I contend, no delivery proved. (WILKINS, J.—It is a strong feature in the case that if the policy was handed to O'Donnell merely to read, it was never reclaimed.) *McDonald, Q. C.*—We are not allowed to prove that attempts were made to reclaim it. Those attempts consisted of conversations with the insured, in which he refused to give it up. This evidence was excluded under the statute. As to delivery, cites *101 Mass.*, 279; *May*, 61. As to countersigning, *May*, 67, 68. Waiver of the countersignature must be pleaded.

The jury should have been told to find a verdict for the defendant; cites *Hill v. Waites, L. T.*, Nov., 28, 1874.

Thompson, contra.—As regards rejection of evidence, this testimony came strictly within the spirit of the clause. The defendant Company is a foreign corporation to all intents and

purposes. The whole contract was a matter exclusively within the breast of the witness, whose testimony was excluded. There can be no stronger case, if the act applies to a corporation, than this, where the agent was the contractor and has the exclusive knowledge of the facts. In *5 Allen* and *15 Gay*, the testimony was received on the express ground that the witness had no interest at all in the subject of the suit; nor was he a party. In the old cases where interested parties were excluded, there was an exception as to agents of companies, but the exception did not apply where the agent had an interest, or where his evidence contradicted the acts that he appeared to have done as an agent. That is this case; *8 Mass. Dig.*, 841.

As to the delivery of the policy, the manual possession of the instrument, acknowledging on its face the receipt, is *prima facie* proof that can only be met by very strong testimony. Allison says that the policy was not out of his possession till May.

Two witnesses say that they saw it in deceased's possession six months before that time. That is especially significant, since the jury found that it was delivered.

There was no tender of any evidence to show that Allison ever tried to get possession of the policy. Evidence of acts or of demands, in writing, would be admissible even under the ruling.

Allison said, when the administrator called on him, that he did not know whether the premium was paid or not.

There is no evidence that the policy was cancelled on the books of the company. All they had to do was to cancel it on the books and give notice to the deceased, which was pleaded in effect, but of which no proof was offered.

The payment of the premium is admitted under seal.

The question of countersigning is the most important. The memorandum printed at the foot written crosswise is not within the body, and is not before the seal, and constitutes no part of the policy.

No replication of waiver is necessary here. The rule as to countersigning is simply that if notice is given that countersigning

is required by a particular person at a designated place, the policy is void without it. Here no person or place is designated, and no countersigning was required. The third plea, stating that the countersigning is required *on the face* is not proved, and the statutable replication is that no such stipulation is on the face of the policy, which is the fact. *Bliss*, 263, 281, 488, 199, 205, 215, 229, 248; *Sharpstein's Dig.*, 16. The latter authority shows that even where the provision is in the body of the policy, the want of the countersigning is not fatal, but that the provision is simply directory to the agents; cites *3 El. & Bl.*, 48, as to effect of acknowledgment on the face of this policy; *Bates' Dig.*, 271, 482, 200, 486, 481; *Addenda to Bliss*, viii., ix.; *1 El. & Bl.*, 183. The company cannot let the policy lie out from May to November in hope of getting the premium and then repudiate it; *16 Gray*, 448; *9 Hare*, 162; *21 L. T., N S.*, 102; *L. R.*, 5 Ch., 288; *Phillips on Ins.*, secs. 513, 514; *1 Camp.*, 532; *2 Parson's Maritime Law*, 182, 502; *Best on Evidence*, 680; *Addison on Contracts*, 187.

McDonald, Q. U., in reply.—The countersigning clause here is equal to a warranty, which is binding wherever it occurs; *1 Arnould on Insurance*, 41. The case of a countersigning is strictly analogous.

As to the exclusion of testimony, in the case cited from *Pickering*, the agent had an interest. Here Allison was never interested in any way; cites *L. R.*, 4 *Exch.*, 87.

As to receipt in the policy being an acknowledgment, there is here no delivery. It is not a deed of the Company until delivered, either on payment of the money, or with an agreement to waive the payment. The mere retention of the policy by the deceased does not amount to delivery. Some distinct act must be shown on the part of the agent to indicate intention to deliver the policy. There is no evidence of anything here of the kind; *L. R.*, 4 *Exch.*, 87.

YOUNG, C. J., now, (April 2nd, 1877,) delivered the judgment of the Court:—

'This is the second time that the extent and meaning of the

proviso to the 41st section of our evidence act, ch. 96, R. S., have come before us for adjudication this term, and I forbear from repeating what I said as to the Massachusetts act and the principles to be applied to our own, in the case of *Chesley v. Rumsey*.* The object of the proviso is to deprive the survivor of two parties on the record of an unfair advantage over the estate of the deceased, by testifying to his acknowledgments, statements, words or conversations, which it may be, and in most cases would be, impossible to contradict or explain. Our experience shows the necessity and the wisdom of the rule, and the question now is, in what spirit is it to be construed, according to the letter or the intent? A large part of the affairs and business of the Province is transacted by corporations, who are multiplying every day, domestic as well as foreign. The principal officers are presidents, secretaries, confidential agents, and managers. This is especially true in the business of insurance, Life, Marine, or Fire, in every branch of which mutual good faith is, or ought to be the rule, and what has passed orally between the parties is often of the utmost consequence. Cases of this class are of perpetual occurrence; these officers are sometimes shareholders, their incomes sometimes depend on the success of their several companies, and they have always the natural sympathy and *esprit de corps* with their employers. Is a different rule of evidence, then, to be applied to them and to individuals, and how far is the difference to extend? Under ch. 54, R. S., sec. 15, any three or more parties may incorporate themselves for any lawful purpose or business. We have on our statute-books sole corporations, *quasi* corporations for schools, agriculture and land. They may all come into our Courts, and are they to have a privilege inconsistent with equal rights and with the impartial administration of the law? If the party with whom they are litigating be a representative of a deceased contractor, shall the officers of these corporations be at liberty to testify to admissions and language of the deceased to which no reply can be given? The reception of such evidence, if it does not contravene the letter, is against the spirit of the proviso. In turning

* Reported as *Chesley v. Murdock et al.*, ante p. 521.

to *Broom's Legal Maxims*, (4th edition,) 551, 658, we find the golden rule that, while respecting the words we should look also to the intent of the statute, and if the construction of it would lead to any absurdity or manifest injustice, Courts ought so to vary and modify the words as to avoid that which it certainly could not have been the intention of the legislature should be done. They will consider the fair meaning of the statute and will expound it differently from the letter in order to preserve the intent. Mr. Allison is the agent of the defendants, who have their headquarters at Toronto. He alone transacted the business of this policy with the insured, now deceased, O'Donnell, and confining myself to the case before me, I think he was not a competent witness to prove the deceased's declarations or admissions against the claim of his administrator.

DESBARRES, J., said he concurred in the opinion of the learned Chief Justice.

WILKINS, J., read the following dissentient opinion:—

This is an action brought on a policy of life insurance. Defendant asserted in one of his pleas that the policy was never delivered to the insured or to any one on his behalf. At the trial, to establish that plea became material. In support of it the defendant called Mr. Frederick Allison, the agent of the defendant foreign company. His competency was questioned in view of the proviso of section 41 of the Evidence Act, one of the parties to the action being the personal representative of the deceased insured. The learned Judge who tried the cause reports that he rejected the proffered witness on that ground. After carefully considering the proviso in question, I am of opinion that the witness was competent and should have been received. According to the plain words, the only subjects of the exclusion are the parties to the action other than the executor or administrator of a deceased person being a party to the record, or the wife of any such other party. Such other parties, and their wives, are debarred from giving evidence on behalf of such other parties, of any dealings, &c., with the deceased, or of any statements, &c., made or words spoken by him, or of any conversation

with him. The exclusion is thus closely defined, and it is not competent for any Court to widen the limits of it, there being a total absence of manifestation of an intent of the legislature that they should be extended. Whatever lies outside of those is *pure and mere conjecture*. What Judges may consider reasonable or otherwise is beside the question. We are dealing with a proviso introduced for the purpose of restricting definitely legislation of a most comprehensive nature, embodied in a clause of which it is a proviso. On an obvious principle of statutable construction, we must therefore construe the statute strictly; (see *Jones v. Wolcott, Adm'x.*, 15 Gray, 541; *Bigelow v. Heyer et al.*, 3 Allen, Mass., 243, adopting this very principle of construction as applied to the statute of Massachusetts which will be found in the volume of General Statutes of Massachusetts, page 673, sec. 14, which book will be found in the Legislative Library.) If this view was not of itself decisive of the question, it would be necessary to consider that in respect of probable or possible mental bias in the mind of a witness, (if we could enter on that view of the case, which clearly we cannot,) an obvious reason exists for excluding a party on the record directly interested in the event of the suit, which does not apply to an agent of a party on the record who is not necessarily interested at all. Such a person the legislature *may not have intended to exclude*. The Court is bound to say of the legislature in this case, *non voluit, quia non dixit*. The verdict obtained by the plaintiff must, in my opinion, be set aside, and the rule therefore be made absolute.

SMITH, J., said he would concur in the opinion delivered by the learned Chief Justice, though he thought it against the strict letter of the act.

ESSON ET AL. v. CAMPBELL.

The payee of a note not legally stamped at the time of making it could not cure the defect by subsequent double stamping, under sec. 12 of chap. 14 of the Dominion Acts of 1870.

This was an action to recover the amount of a promissory note made to plaintiffs or order. Pleas:—1, denying making; 2, denying consideration; 3, alleging fraud; 4, alleging that a note for a larger amount, made by E. W. Chipman & Co., bearing defendant's endorsement, not made by him, was dishonored by E. W. Chipman & Co., and being held by plaintiffs, they falsely represented to defendant, not showing him the note, that they held a note with his endorsement, and by that means induced defendant to make the note sued upon, by way of renewal; 5, alleging note not duly stamped. A replication was pleaded alleging a double stamping to comply with the statute. The writ was issued 4th February, 1874. The pleas were filed on the 18th of the same month. The replication was filed in November, 1874. The cause was tried in April, 1875. A verdict was found for plaintiffs, and a rule *nisi* to set it aside granted by the learned Chief Justice, who tried the cause, was argued this Term.

Sedgewick, in support of rule.—The Judge refused to allow the witnesses to compare the disputed note with admittedly genuine notes. He would not allow any witness to look at any signature but the signature in dispute. We called a witness who did not know Campbell's signature, but was prepared, on comparing the disputed signature with those admitted to be genuine, to swear that the signature was not that of Campbell; cites R. S., page 545. Nothing could be clearer than that enactment; *Taylor on Evidence*, 1483. Suppose it were impossible to get any witness acquainted with the signature of the party, then the comparison would be the only evidence available.

The defence that there was no consideration for the note sued on is good if the original note was a forgery. If Campbell made the renewal on the forged note under the impression that

the forged note was genuine, and Esson & Co. were not prejudiced in any way, there was no consideration for the note sued on. It would be otherwise if plaintiffs had given up any security as a consideration for the renewal note; *Mather v. Lord Maidstone*, 18 C. B., 273. The forged note was dated 3rd July, and became due on October 6th. On that day, before any notice of dishonor could have been sent to the defendant, plaintiffs' book-keeper came to the defendant and got the renewal. Campbell knew before this that plaintiffs held some of his paper. The notice of dishonor was subsequent to that, viz., on the 9th. The note sued on must be taken to have been made on the 6th. (*McDonald, Q. C.*, admits that the note was made on the 6th.) Campbell was therefore guilty of no laches. Esson & Co. were not prejudiced. They had not given up the forged note at the time the renewal was made; if they had they might perhaps have been prejudiced, having given up Chipman's liability on the original note. The original note came out of the plaintiffs' possession.

There was misdirection. The Judge told the jury that under the law, even admitting that the first note was a forgery, yet in his opinion plaintiffs were entitled to recover. Further, after shutting out the evidence of comparison, he told the jury that it was a very difficult thing for a man to identify his signature without an ear-mark.

In reference to the original note,—it was improper that any evidence should be given of that note "D," which Campbell said he did not indorse. The moment he said that all evidence on that note should have been excluded. They produced it for the purpose of contradicting Campbell. The evidence of Scott that he had seen defendant sign this note was not admissible. The moment that indorsement was denied by Campbell, it was outside the case.

The note sued on was not admissible in evidence at all because it was improperly stamped. There are a twenty and ten cent stamp unobliterated on the note. That was the position of the note until November, 1874, long after the writ was issued and after the pleas were pleaded setting up the defence of the stamp act. A payee was not when the writ was issued such a party

as could double stamp a note ; *Murdock v. Dunn*, (unreported). The Dominion Act of 1867, p. 63, provides that a repealing act shall not affect proceedings already commenced. The act of 1874 cannot therefore be held to apply to this suit. Cites *Escott v. Escott*, 22. U. C. C. P., 305, and *House v. House*, 24 U. C. C. P., 526, confirming it.

Assuming that the Act of 1874, would allow double stamping, in this case plaintiffs must be considered as knowing that the note was not properly stamped, and therefore they did not obliterate the double stamps when they first obtained knowledge as required by the Act. The plea on the record gave the parties knowledge that the note was not properly stamped.

Meagher, contra.—Comments on the utter worthlessness of the testimony of the experts given in this case, showing that the witnesses who swore to the belief as to forgery based their opinion on different and inconsistent grounds. Defendant is contradicted by Scott. The evidence of Scott was given, not for the purpose of comparison, but to contradict defendant, and was therefore admissible.

There was consideration for the note sued on. Mr. Campbell got the discount of the very note which it is alleged was forged, as shown by evidence of the discount clerk that the proceeds were put to Chipman's credit and went to retire overdue notes on which was Campbell's name. If the purpose had been foreign to Campbell's interest there might have been some inducement for a forgery. Here there was none. Cites *Willes on Circumstantial Evidence*, 135, 138, as to the value of expert testimony.

The exceptions in the Interpretation Act cited contra, apply merely to a repealing statute, and not to an amending statute. The latter contains a clause bringing the amended provisions into force, and they were therefore applicable to this suit.

Campbell had full notice of the original note and his signing the renewal warranted the plaintiffs in the belief that the note was a genuine one.

The comparison of signatures is not allowed for the purpose of enabling a party to disprove his own signature, and make

evidence for himself. The objection taken by *Taylor*, that the party, under the provisions of the act allowing comparison to be made, may make evidence for himself, applies in this case, because it was possible for the defendant to anticipate these suits and shape his signatures with a view to future defences of this kind. In *18 C. B.*, the plea there pleaded was held to be bad. Were it not for the allegation here of a fraudulent representation, the plea here would be bad under that case.

McDonald, Q. C. As to the question of stamps. Admitting that the stamps were not cancelled, there is no pretence of attempt to defraud the revenue. Apart from the double stamps, it was a mere omission to cancel the stamps. As to the time of affixing the stamps it is sworn that the double stamps were put on as soon as knowledge was acquired. It is argued that the plea of the stamp act should be taken to have imparted the knowledge. Mr. Meagher was not Mr. Esson's agent for stamping the notes, and further, he (Meagher) swears that he was not aware that the plea contained an allegation that the bills were unstamped. The knowledge of the Attorney cannot legally be the knowledge of the party, as the Attorney has not the authority to stamp.

As to the objection that Esson, being the payee, is not a subsequent holder under the act and cannot double stamp, the act of 1874 enabling the payee to double stamp applies here. Cites the amending Stamp Act of 1874. The double stamps were put on after the Act of 1874 came into operation. That act allowed plaintiff to double stamp.

Cites *McLellan v. Butler*, 1 R. & C., 35. Mr. Esson, although the payee, is also the endorser, and the note went into the Bank. If not a "subsequent party" as payee he becomes so as endorser, after endorsing the note. The payee, Esson, was a "subsequent party" to the note the moment he received it.

As to the refusal to permit evidence of comparison, the refusal was right. The comparison contemplated is the comparison of experts. The witnesses tendered here were persons who swore that they knew the signature of Campbell. Suppose the

evidence was improperly rejected, it does not follow that the verdict must go. Refers to *Taylor on evidence*, which is inconsistent with our statute.

Assuming the endorsement to be a forgery, the plaintiff is entitled to recover. Refers to laches of defendant and cites *Byles on Bills*, 502, 503; 4 *Bing.*, 203; 4 *C. B.*, 82; 7 *C. B.*, 400; 2 *H. & C.*, 175; 7 *C. B.*, 82; *L. R. 1 C. P.*, 463; 9 *B. & C.*, 902.

Weatherbe, in reply.—Refers to *McLellan v. Butler 1 R. & C.*, 35. That was a case of a Bill of Exchange where it was a subsequent party that double stamped the bill, and was different from the case of *Murdock v. Dunn* (unreported), where it was the payee that double stamped the note. *Murdock v. Dunn* is still law. The authorities are conclusive that where the attorney has notice of the plea of the stamp act, the knowledge is attributed to the party; 36 *U. C. Q. B.*, 80. The payee is not a subsequent party.

It is contended that the act is retrospective. The interpretation act expressly provides otherwise. *Sedgewick on construction of statutes*, 114; 6 *Ad. & E.*, 951. The note in this case was void at the time action was brought.

Even if the act of 1874 did apply, the parties have not done what was necessary to give them relief, not having affixed double stamps when knowledge was first obtained. The attorney had knowledge, and admitted that he told defendant's attorney he was going to set the plea aside. The evidence as to *scienter* should at least have been put to the jury. In *Murdock v. Dunn* the double stamps were put on the moment the plea of insufficient stamping was put in; cites *Kelly v. Solari*, 9 *M. & W.*, 54; 4 *F. & F.*, 440.

The Judge told the jury that even if the note was a forgery that was no defence. He should have said to the jury, "If you find it true that this note was made under a mistake, you will return a verdict accordingly." It was taken away from the jury, and the plaintiff had all the benefit of a demurrer.

SMITH, J., now (April 2nd, 1877,) delivered the judgment of the Court:—

This was an action brought by *William-Esson* and *Alexander Anderson* to recover from the defendant, *William Campbell*, the amount of a promissory note alleged to have been given by the defendant to the plaintiffs, dated the 6th of October, 1873.

The defendant pleads :—

1st.—That he did not make the note.

2nd.—That he made it for the accommodation of the plaintiffs, and without consideration.

3rd —That he was induced to make the note by the fraud of the plaintiffs.

4th —That the note was given in renewal of another which one Edward W. Chipman had given on the 3rd of July, 1873, for \$1669.72, which plaintiffs falsely represented to the defendant he had endorsed, and was liable upon; that the defendant, believing he had endorsed said note from such representation, and was liable thereon, did, without any other consideration, give the said note declared upon.

5th.—That the said note was not duly stamped.

To this the plaintiffs reply :—

1st.—That when they became holders of the note they had no knowledge that the proper duty had not been paid thereon by the proper party, or at the proper time, and that they paid double duty on said note by affixing to it stamps to the amount thereof and duly obliterating them so soon as they acquired such knowledge.

2nd.—That when plaintiffs became holders of the note it had upon it stamps to the amount required by law; that they had no knowledge that the stamps so affixed were not obliterated, and they paid double duty thereon by affixing to said note stamps to the amount of such double duty, and duly obliterated them as soon as they acquired such knowledge.

It will be unnecessary for me, entertaining the views I do of this case, to express my opinion upon the rejection of the comparison by witnesses of proved signatures of defendant with the particular one in question, yet, I may say that, if this were the only ground that could prevent the plaintiffs from retaining their verdict, I should be most unwilling to disturb it. Were it not

for a difficulty which appears to me insuperable in the plaintiffs' way, I should be inclined to allow the verdict to remain.

The defendant's 5th plea threw upon the plaintiffs the *onus* of proving the note declared upon to be a valid instrument, by being stamped in compliance with the provisions of the Dominion Stamp Acts, and I am reluctantly constrained to say that, in my opinion, they have failed to do so. It seems impossible to me to read the 12th section of the Dominion Act of 1870, chapter 14, substituted for the 12th section of chapter 9 of the Acts of 1867, without coming to the conclusion that the plaintiffs could not cure the original defect in, or give validity to the note by double stamping it under this section. There cannot be a doubt that the plaintiffs were "original parties" to the note, and not "subsequent;" nor were they, in the words of this statute, "holders without becoming parties thereto." To this class of persons this section alone applies. To decide otherwise would be to do violence to the language of the Act, as well as to the evident intention of the Legislature.

The strictness of previous legislation was doubtless sought to be relaxed, but not in such a manner as to open the way for evading the requirements and object of the law. To permit a party to "a promissory note, draft, or bill of exchange," who was such at the time it was made an instrument of that kind, to lie back for months without seeing that the law had been complied with, and then to validate an illegal note, would be repugnant to the purpose and the ameliorating spirit of the legislation on the subject. It is obvious that the provisions of the Act of 1870 are intended to apply to those only who, from their positions as *subsequent* parties or innocent holders, could not be supposed to have knowledge at the time of the making of the note that the duty had not been paid at the proper time and by the proper parties, and, therefore, it can hardly be held that a payee comes within its protecting operation.

The law appears to my mind so clear that there is no alternative left but to hold that it was not competent for plaintiffs by double stamping the note in question to make it a valid instrument.

The rule, therefore, must be made absolute.

BRADLEY v. McLEAN.

Plaintiff purchased all the personal property of the L. Coal Mining Co'y., after the Company had become hopelessly insolvent, receiving a bill of sale signed by the agent of the Company, but not sealed with the corporate seal, proved to have been possessed by the Company. He took possession of the goods at the time of the sale and remained in possession until the cause of action indicated below arose.

Held, in an action against a Sheriff for subsequently selling the goods under an order of the Supreme Court, following a levy under a writ of attachment against the L. Coal Mining Co'y., that under the provisions of Chapter 53, R. S., Section 15, the use of the corporate seal upon the bill of sale was not necessary.

WILKINS, J., dissenting.

Held, on demurrer to the defendant's plea, which set out the attachment and levy of the goods, "as and being the goods of the L. Coal Mining Co.," and the sale of the goods, "being the property of the L. Coal Mining Co'y.," that the plea was bad, as it did not allege that the goods were not the goods of the plaintiff.

WILKINS, J., dissenting.

This was an action of trover against the Sheriff of the County of Cumberland for the alleged conversion of certain goods levied and sold under a writ of attachment in a suit brought by one *Hibbard* against the *Lawrence Coal Mining Company*. The defendant pleaded the proceedings and writ of attachment in that suit. Plaintiff replied a discontinuance of the suit, to which defendant demurred, and rejoined by leave. The cause was tried on the pleadings at Amherst in October, 1876, before SIR WM. YOUNG, C. J., and a verdict found for plaintiff. A rule *nisi* to set the verdict aside and for a new trial was granted, and argued with the demurrer to the replication, before YOUNG, C. J., and DESBARRÉS, WILKINS and McDONALD, JJ., February 6th, 1877.

Townshend in support of rule. This is an action against the Sheriff, and it makes no difference who stands behind. He was obliged to sell under the writ directed to him, and to hold the proceeds subject to the order of the Court. Cites 20 Q. B., 852; 1 *Strange*, 592, adopted in 2 Wm. Bl., 45; 15 *East*, 615, n. c. He pleads that he seized the property as property of the Lawrence Coal Company, and the plaintiff's replication does not deny that the property was the property of the Company. The writ under which he seized and the order under which he sold the goods have never been set aside, and he holds the proceeds yet, subject to the order of the Court. It is not alleged that the order under which defendant acted has ever been set aside. Cites R. S., Ch. 97, sec. 16.

The COURT.—Is not your fourth plea, in which you justify under the writ and order, bad, for not alleging that the goods were not the goods of plaintiff?

Townshend.—It alleges them to be the goods of the Company, and thereby implies plainly that they were not the goods of plaintiff. The defendant having denied plaintiff's property in the goods he should have proved his property in them clearly. The evidence on which he relies is a document transferring them to him from the Company, which document cannot operate for want of the corporation seal. Rev. St. p. 276, sec. 15, applies only to acts done in the ordinary scope of the Company's business, but this was a sale of all the real and personal property of the Company, thus virtually putting an end to the corporation. *Pollock on Contracts*, 128-9, 130. 3 *L. R.*, C. P. 463; 5 *El. & Bl.*, 409; *Brice on Ultra Vires*, 312-3-4; *Abbott on Corporations*, 723-4. The circumstances shew that the sale to Bradley was illegal and fraudulent. Bradley and all the other parties to that sale were directors, and as directors they were trustees for the shareholders, and none of them could purchase. *Perry on Trusts*, sec. 207. Then the mode of sale was illegal. The stock-holders appointed three persons as agents to conduct the sale, and only one of them acted; *Story on Agency*, §§ 42 and 147. *Brice on Ultra Vires*, 385; *Pollock on Contracts*, 223 to 230; *Abbott on Corporations*, 11, §95; *Ames on Corporations*, 277. Having been appointed to carry out the sale jointly, one could not sell separately; *Pollock on Contracts*, 87; *Brice on Ultra Vires*, 377. The record book of the Company was inadmissible, and was not properly proved. The Secretary of the Company was examined, but was never asked if the book contained correct records of the corporation. There is no evidence of possession in Bradley. The evidence shews possession in the Lawrence Coal Mining Company up to the time of the levy. The award made by Mr. Oldright in the suit of Hibbard v. Lawrence C. M. Co'y. was rejected, while other papers on file in the case were received.

Thompson, (with whom was *Johnston, Q. C.*.) contra.—The point already suggested by your Lordships is conclusive as

to the demurrer. The allegation that the goods were the property of the Coal Company does not necessarily deny that they were the property of the plaintiff. If the plea is good, which sets up Hibbard, the plaintiff, in the other suit, in place of the Sheriff, the replication demurred to is also good, because it shows that Hibbard, thus put in place of the nominal defendant, had virtually rescinded the attachment and order by discontinuing the suit. It is a singular thing that the order for the sale of these goods, which are of the most solid character, iron and brick, was granted by the prothonotary as for a sale of perishable goods.

The sale to Bradley was made for the payment of the debt of the Company, and if it was not to be held within the scope of its charter, it becomes impossible for a Company to meet its obligations by a sale of its property. Section 2 of the Act explains section 15, already referred to.

This contract does not require to be under seal, because it is entirely executed. Bradley has got delivery of the property and paid for it. It is a singular proceeding for this defendant, a stranger, to come in and seek to overturn a transaction which the Company has acquiesced in.

(Young, C. J.—Mr. Hibbard, the moment he discontinued the action, ought to have given up the property.)

Thompson.—In *Abbott on Corporations*, 225, and a case there cited, there is authority to show that acts of agents will bind a Company. The sale was not only complete, but confirmed by the Company. There are a number of cases showing that where there is any seal, say a wafer, on a document, purporting to be executed by a Company, the Court will presume the seal to be the seal of the Company in the absence of evidence to the contrary. *1 Johnson's Cases*, 319; *Abbott on Corporations*, 742. *Fish. Dig.*, 1996, contains the principal cases on this subject. *5 El. & Bl.*, 409, is a strong case in our favor. *Angell & Ames on Corporations*, 214.

Meagher, in reply.—The evidence proved that these goods, the personal property of the Company, could not have passed to Bradley under his execution, because they were sold over again.

The transfer to Bradley of the personal property is signed by one only of the three agents, and is consequently void. A sale by an agent to himself, which is the case here, is absolutely void. *14 Peters' N. B. Rep.*, 42; *4 B. & Ad.*, 315; *9 East*, 360.

THE COURT.—What right have you, a stranger, to come here to attack that sale, found by the jury, with the approval of the Judge who tried the cause, to have been made in good faith between the Company and this plaintiff?

Meagher.—I will not argue the point further, but our fourth plea, alleging the goods to be the property of the Coal Company, is not traversed, and we must succeed on that. With regard to the reception of the record books of the Company, see *3 B & Ad.*, 144, and *Roscoe*, 915.

DESBARRES, J., now (April 2nd, 1877,) delivered the judgment of the Court:—

This was an action against defendant as Sheriff of the County of Cumberland, for converting to his own use the plaintiff's goods. The defendant by his first plea denies that he converted the plaintiff's goods to his own use, and by his second plea says that the goods were not the property of the plaintiff; thirdly, that the plaintiff was not possessed, nor was he entitled to the possession, of said goods, and, fourthly, that on the 25th day of May, 1872, a writ of attachment was issued out of the Supreme Court at Amherst at the suit of one George Hibbard against the Lawrence Coal Mining Company to the value of \$1858, to respond the judgment which might be obtained by said George Hibbard against the Company, and said writ being in full force, the defendant, as such Sheriff, before the return thereof and in obedience thereto attached and levied on the goods in the plaintiff's writ mentioned for the purposes aforesaid for said sum, being the amount endorsed thereon, as and being the goods of the Lawrence Coal Mining Company, and afterwards on the day of November, 1872, a certain order issued out of said Court at Amherst aforesaid, signed by A. S. Blinkhorn, Prothonotary of said Court for the County of Cumberland, directed

to defendant as such Sheriff as aforesaid, whereby he was ordered and required amongst other things to put up and sell the said goods at public auction as such Sheriff as aforesaid, to respond to the said judgment which might thereafter be obtained,—and defendant says that the said order being in full force, in obedience thereto he put up and sold the said goods, being the property of the Lawrence Coal Mining Company, at public auction, for the purpose aforesaid which is the alleged conversion.

The plaintiff took issue upon the first, second, and third pleas, and to the fourth plea replied that after the proceedings taken by the said George Hibbard against the Lawrence Coal Mining Company, the suit was discontinued by him, and the attachment and all proceedings thereunder were thereby abandoned, and the discontinuance put on the files of the Court. The defendant by leave of the Court rejoined to plaintiff's replication, first that the cause was not discontinued, and second, that the discontinuance was not filed until after the goods mentioned in the writ were sold under the order in the said plea mentioned, and the proceeds applied as therein directed. The defendant also demurred to the plaintiff's replication as being bad in substance, inasmuch as the Sheriff was justified by the writ of attachment and order of sale, and bound to execute it, that the act of plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, could not and did not affect his jurisdiction.

The cause was tried before the Chief Justice at Amherst in October, 1876. A verdict was found for the plaintiff for \$500, and a rule *nisi* was granted to set it aside, upon the following grounds: 1st., that the verdict was against law and evidence; 2nd., that the learned Chief Justice misdirected the jury; 3rd., that evidence was improperly received; 4th., that evidence was improperly rejected; 5th., that there was no sufficient evidence of the conversion of the goods.

The rule and the demurrer were lately argued together before the full Court, and our decision is required to be given on both. The only important question that arises in this case, according to my view, is, whether the goods taken by the defendant under the attachment by George Hibbard against the

Lawrence Coal Mining Company were, when so taken, the goods of that Company, to whom they had unquestionably previously belonged, or whether the right of property thereon had before then legally passed to and been sold and transferred by the Company to the plaintiff, who now claims to be the legal owner of them. The jury have passed their opinion on this question, and we must consider whether they were right in doing so under the evidence. It appears from the report that a judgment was obtained in this Court by the plaintiff and others on the 11th September, 1865, against the Lawrence Coal Mining Company, for \$10,000, besides the costs, and that on the 6th of November, 1866, all the real estate of said Company situate at River Hebert was sold at public auction by defendant, as Sheriff of the County of Cumberland, under an execution issued upon that judgment, and the plaintiff became the purchaser for the sum of \$3975. The defendant, on the same day, executed a deed to the plaintiff, by which all the title and interest of the Company in the property described therein passed to the plaintiff. The personal property, though advertised by the defendant to be sold under the same execution, was left on the premises unsold. It also appears from the deposition of *John C. Alden*, Commissioner of this Court, that one *J. R. Hawley*, a director of said Company, residing in Boston, was in 1867 authorized by *Charles E. Miles*, as President, and himself, as General Agent of said Company, with the sanction of a majority of the stockholders, to come to Nova Scotia and sell the personal property of the Company,—that Hawley came and effected a sale of it, and on his return from Nova Scotia reported to the Company that he had sold the property to the plaintiff and handed him the paper marked “A,” together with the inventory. This paper is in the following words:—

“ RIVER. HEBERT,

“ Cumberland County, Nova Scotia,

“ July 5th, 1867.

“ Know all men by these presents that Benjamin Bradley, of Boston, Commonwealth of Massachusetts, United States of America, has this day purchased through J. R. Hawley,

authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, Ezra C. Dillingham.

“Signed in behalf of the Company, by J. R. HAWLEY,
Agent, (L. S.)

“Signed in behalf of BENJAMIN BRADLEY, the purchaser, by EZRA C. DILLINGHAM, (L. S.)

“Witnesses,—GEORGE MOFFATT, (L. S.)

“NATHAN C. HOG, (L. S.)

“JESSE C. HOG, X his mark, (L. S.)

This witness, *Alden*, further testified that the signature, “J. C. Hawley,” to this paper, was his handwriting, and that the signature of E. C. Dillingham, also subscribed thereto, was in his handwriting; that he believed all the witnesses to this paper were dead; that the sale made to the plaintiff under this document was adopted by the officers of the Company, Dillingham being at the time a shareholder of the Company as well as himself; that the plaintiff paid for the property by relinquishing notes and claims he held against the Company to the amount of \$1500. The plaintiff, on being called as a witness, stated that he was a director and shareholder of the Company, and that they were indebted to him partly on notes and for a large amount of interest; that Hawley came from Boston to sell the property of the Company, and he had purchased it; that the plaintiffs in the judgment against the Company were all directors of the Company, and that the minute book produced at the trial in evidence was the original book and record of the proceedings of the Company; that *J. C. Alden* was the Secretary of the Company and came down to represent him, and Dillingham came down with *Hawley*; that there was no entry in the minute book confirming the sale to him; that George Moffatt, senior, occupied the premises for him after 1866, and then his son; that all the goods seized under the attachment were on the premises sold to him; that in 1865 and 1866 the Company was hopelessly insolvent, and owed \$150,000, but the stockholders paid every dollar they owed except \$29 claimed by Hibbard; that after 1865 and 1866 the shareholders could not be got together, and no meeting could be had except of the

directors. "We acted," he says, "in good faith, and paid every debt in Nova Scotia, with all the royalties." He says that *A. Moffatt, junior*, was his agent in the mines in 1872, and *Alden*, at Boston, conducted the correspondence after 1866; that the real estate in 1866, and the personal property in 1867, became and was treated wholly as his own, and no one made claim to it to his knowledge, and he heard no claim made by *Hibbard* until his attachment.

In his cross-examination he says: "The Company was incorporated under the Joint Stock Companies' Act of Nova Scotia. They had no meeting from February, 1866, till December, 1874. There was no election of officers in that interval. *Hibbard* was the managing director previous to 1865. He was the only director in Nova Scotia, but there were other managers. He occupied the house that was sold to witness and continued in it, but paid no rent for it. The Company took the management from *Hibbard* for a year and more. He was the manager in 1867. Some of the directors are interested in the property and in any surplus. This is a mere honorary obligation. The transaction was open and above board. In 1865 we were endeavoring to sell out the mine. *Alden*, *Dillingham*, *Hawley* and *Wentworth* are the four who have the honorary obligation spoken of. *Hibbard* made no advances; they did." The defendant, being called, proved the deed "A," executed by himself to the plaintiff, dated 6th November, 1866, and also an advertisement marked "D," of personal property, dated 3rd November, for a sale on the 7th November, 1866, which did not take place. He says that in 1872 he sold the mines, houses, and other things enumerated in the writ, under the order of A. S. Blixborn, the Prothonotary, marked "E," and dated November, 1872.

Frederick Carmichael proved the value of the goods described in plaintiff's writ to be \$1149.50. *John Moffitt* says, "My father died in 1874, and was in charge of the mining premises and property for plaintiff till 1871. I was afterwards in charge. I acted under the letters from *Alden* of 10th March, 1871, 24th May, 11th December, and 24th January, 1872, and 4th June, 1872. After March, 1871, I put parties into

the house. Till then my father was in it. I believe my father received remuneration. I received some up to the present. I was at the sale in December, 1872, and forbade it for plaintiff. There was a tenant then in the house. All the goods seized were stored. All the miners' houses were sold. One of them was removed by *Taylor* two or three years after; some of the goods were removed." On cross-examination he said, "I presume my father was acting for the Company. I knew of plaintiff before March, 1871. *Alden* was here more than once; he was acting for the Company. I sold some of the property, old iron, and got the house rent." On re-examination the witness said,—“I paid taxes and accounted with the plaintiffs for the iron sold. I had letters from him. I had one in June, 1872.” The discontinuance of plaintiff's suit by attachment of 11th December was here put in, and plaintiff rested his case.

It is clear from the evidence produced on the part of the plaintiff, which is not at all contradicted, but is in several respects corroborated by that of *George Hibbard*, the only witness called on the defence, that the goods in question were sold by *Hauley* in July, 1867, as agent of, and on behalf of, the Company, for a debt due by the Company to the plaintiff on notes amounting to \$1500, which notes, on the sale being effected, were given up by the plaintiff to the Company, who from that time never claimed, or pretended to claim, any right of property in the goods.

The plaintiff had actual possession of the goods through his agents *Moffatt*, the father, and *Moffatt*, the son, from the time they became his property until the defendant seized them under the writ of attachment at the suit of *Hibbard*, yet it was contended on the part of the defendant at the argument that the right of property in these goods was still in the Company, because the corporate seal was not affixed to paper “A,” which, for want of that seal, was an invalid instrument that conveyed no right to the plaintiff in the goods. This is a formality that is not required to be observed in the ordinary transactions of a trading company, it being now a well established doctrine that a trading corporation, such as this was, may make binding agreements in furtherance of the purposes of their incorporation

without using their seal. See *Brice on Ultra Vires*, 312; 5 *M. & G.*, 131; 16 *Q. B.*, 229; 5 *E. & B.*, 409; 11 *Exch.*, 228. But it is not necessary to cite cases in support of this principle, for the Legislature, by chap. 53, R. S., sec. 15, has enacted, "that the acts of incorporated companies, performed within the scope of their charters or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by, the seal of such corporations." I think the right of property in the goods passed from the Company to the plaintiff under the sale made to him by *Hawley*, the agent of the Company, and that being in possession of the goods under that sale, which it appears was adopted and sanctioned by the officers of the Company, the plaintiff was entitled to recover, and that the verdict found in his favor for a conversion ought to stand. I also think that the defendant's fourth plea is bad, and that although it may be doubtful whether the replication to that plea, to which the defendant has demurred, is a good replication, yet, as the first fault in pleading was made by the defendant, the plaintiff is entitled to our judgment on the demurrer (*Stephen on pleading*, 141,) and the rule for setting aside the verdict must be discharged, with costs.

WILKINS, J., read the following dissentient opinion :—

It is quite unnecessary for me to cite authorities to show that by law, independent of the provisions of our general statute respecting corporations, the use of the corporate seal proved to have been possessed by the incorporated association of which plaintiff was a member, was indispensable to the legal efficacy of that contract by means of which he claimed that the goods in question, the property of the corporation, had been transferred to him. I may say, however, that I have carefully examined the authorities and find the conclusion indicated inevitable. Having arrived at it, it became my duty to examine and consider the Provincial Statute. I have done so in the light of the evidence, and have found that it leaves the plaintiff's position in reference to the question precisely what it would have been if the statute had never existed. The only sections of chapter 53,—the statute in question,—that affect

the case are, first, section 15. Its words are these, "The acts of incorporated companies performed *within the scope of their charter or acts creating them* shall be valid, notwithstanding they may not be done under, or be authenticated by, the seal of such corporations." That means, of course (it will bear no other meaning,) that for *the transaction of the business for which they are chartered or incorporated*, the use of the corporate seal is not necessary. If, when an incorporated Company has ceased to carry on the business for which it was chartered or incorporated, the act of selling off the real and personal property of the corporation *is an act done within the scope of the company's charter or act creating it*, my view of the case before us is a fallacy. The business of this Company had ended before the transfer of this property was made. The transfer was made, avowedly, because the property transferred was no longer required for carrying on the business of the Company. The plaintiff, himself, while relying on the transfer, declared *that the Company had become hopelessly insolvent*.

The act of transfer could only be brought within the statute by showing that it was done under, and by virtue of, section 2; and that could only be effected by showing (*as was not shown in any manner whatever*,) that the corporation had made a by-law "declaring the manner of conveyance of their personal estate," and that thereby the use of a corporate seal was not required for that purpose. The existence of such a by-law was not proved, or pretended to be proved, at the trial. Therefore, it follows absolutely and inevitably that if we are to be governed by the plain meaning of the plain words of the statute this act of transfer is not within its provisions. The written paper purporting to be the transfer had not applied to it the seal of the corporation. (Here the Judge read the paper, *ante* p. 589.) If this act of the Company, done, as the plaintiff proved, and as has been already stated, after the Company had become hopelessly insolvent, and in the absence of proof of the existence of an authoritating bye-law, can be regarded as an act done within the scope of the charter or act of incorporation, and so, within the meaning of section 15, all I have to say is, I shall rise from the conclusion of this case with an impression that I

am not as competent to construe plain words of my own language as I thought I was when I entered on the consideration of it. I am of opinion that when the learned Judge who tried this cause expressed his opinion to the jury that, under the statute, a use of the corporate seal was not necessary, the jury in that respect were misdirected. I have said more about this case than was necessary in any other view of it than this, viz., that the defendant is an officer of our own Court, who may be seriously affected by the decision, and who may be advised to carry the case further.

With regard to the demurrer—the replication is bad, and the plea to which it is a replication, though inartificial, is not bad *in substance*, inasmuch as it states that the defendant, as sheriff, under a writ of attachment delivered to him to be executed, levied on, &c., the goods in question, *being the property of that party against whom the writ had issued*. That in substance was a sufficient defensive allegation.

YOUNG, C. J., said it appeared from the evidence that certain parties in Boston had organized a Company for the purpose of mining coal in this Province; that they found the enterprise would not pay and, accordingly, gave it up, paying off every shilling that they owed, a course very few companies followed. It appeared also that two or three directors had advanced large sums of money on behalf of the Company, and that they were to be secured as far as possible by the property of the Company. After the transfer of the property, *Mr. Hibbard* took out a writ of attachment against the Company as an absent or absconding debtor, and on the trial of an action brought against the sheriff for his proceedings under the writ of attachment and subsequent order of the Court, the question arose, whether the sale of the Company's goods to *Bradley* was good, the document by which the transfer was effected not being under seal. He considered the sale to *Bradley* under the evidence to have been perfectly legitimate and *bona fide*, and to be good in point of law.



IN RE PETER ROSS.

A rule for attachment for a contempt of Court committed during an adjourned term, (adjourned under R. 8., c. 94, sec. 11,) can be moved for on the last day of such term : and it is no objection to the rule that it is made returnable to the next term. A rule nisi for an attachment can be moved for on the last day of Term for a contempt committed during the Term. But the rule will be discharged if headed "In re, &c.," when there is no such matter depending in Court.

The following order was made by the Court on the first day of March, A. D., 1876.

IN THE SUPREME COURT, 1876.

HALIFAX, SS.

IN RE PETER ROSS.

Upon the information of the Honorable Samuel Leonard Shannon, Queen's Counsel, this day made in open Court, and upon reading the affidavit of the Honorable Otto S. Weeks, Her Majesty's Attorney General for the Province of Nova Scotia, with the exhibits thereto annexed, and of George E. Morton, and the exhibits thereto annexed, and of the said Samuel Leonard Shannon, and upon reading a copy of a printed newspaper called the "*Citizen*," referred to in the said affidavits, and annexed to the affidavit of the said George E. Morton, appearing to have been published by the Halifax Citizen Printing and Publishing Company, in which Peter Ross is a shareholder, at Halifax, on the 17th day of February in the year of our Lord one thousand eight hundred and seventy-six, when this Court was sitting *in banc*, in the editorial column of which is inserted and published a scandalous and libellous article and statement reflecting on the administration of justice in this Province by the Supreme Court, commencing with the words, "Clearing the Docket," tending to the great obstruction of the course of justice and being a contempt of this Court, then in session ;

It is ordered that the said Peter Ross do personally attend this Honorable Court on the first day of the next ensuing term of this Honorable Court, at eleven of the clock in the

forenoon of the said day, and further, that he then and there show cause why an attachment should not be issued against him for such contempt as aforesaid, and why he should not be committed to prison or otherwise dealt with according to law, as this Court shall think fit to order.

Dated at Halifax, this first day of March, A. D., 1876.

By the Court,

(Sgd.) M. I. WILKINS,
Prothy.

The regular December term of the Court had been extended by an order made by the Judges, under the authority of R. S., cap. 94, sec. 11, and the above rule was made on the last day of the adjourned or extended term. The matter came on for argument, before the full Court, during the present term.

Russell took preliminary objections to the rule:—

First, that no such order could be made during the adjourned term, as the order extending the term and the statute under which it was passed limited the purposes for which the term was extended and confined the Court to the disposal of the causes on the docket;

Secondly, that no rule *nisi* could be granted for an attachment on the last day of term; *Anon.*, 3 Lofft, 301; *Anon.*, 3 Smith, 118; *Tidd's Pr.*, 481; *Anon.*, 1 Burr., 651; *Rex v. York*, 5 Burr., 2686; Per Lord MANSFIELD in *Jacob's case*, 4 Burr., 2502;

Thirdly, that the affidavits and rule should not have been headed "*in re*," as there was no cause or matter depending in Court; *Tidd*, 492, citing 7 T. R., 454; *Rex v. Harrison et al.*, 6 T. R., 60.

Shannon, Q. C., contra, as to the last point, contended that the practice relied upon was based on mere rules of Court, which did not apply here.

The argument on the merits was then proceeded with, *Shannon, Q. C.*, moving to make the rule absolute, *Russell & Chesley* showing cause. As the decision of the Court turned wholly upon the preliminary objections, the argument on the merits is omitted.

RITCHIE, E. J., now, (April 2nd, 1877,) delivered the judgment of the Court :—

The objection that this motion could not be made on the last day of the adjourned term is in my opinion groundless. The powers of the Court were in full force until the final adjournment. The term continued to all intents and purposes till then. The extension is made for such a period as the judges may deem necessary for the disposal of the causes on the docket ; but so long as the term continued all the powers of the Court could be exercised, and I do not know that a more fitting time could have been taken to make the motion. It related to the disposal of the causes on the docket, and the Court does not allow the arguments to be interrupted to hear motions on other matters unless they are of an urgent character requiring the immediate action of the Court. The alleged contempt took place at about the time the arguments had closed ; surely if such an offence has been committed in term, the Court has power at once to proceed against the offender for the contempt. It has always been the practice of this Court to hear motions on the last day of the term, unless they might have been made on the first day of the term or other days set apart for motions, and any other practice would be attended with great inconvenience as we have but one term and no sitting of the Court in *in banc* from April to December. In the Queen's Bench in England the Court would, in my opinion, grant such a rule *nisi* under like circumstances. A distinction there is made between an offence committed previous to the commencement of the term and one committed during the term. In the former case an application will not be allowed so late in the term that cause cannot be shewn during the term. But while in the case of *Rex v. Smith*, 7 T. R., 80, this was admitted to be the rule, it was held that the motion could be made at the end of the term for supposed misconduct during the term. If the motion had delayed till next term an objection on the ground of delay would have been entitled to more weight.

The objection taken to the affidavit on which the rule has been granted is of a more serious character. It is unquestionably the rule, both here and in the Queen's Bench in England,

that if an affidavit is headed in a cause before there is any such cause in Court, such an affidavit cannot be read; and if a rule *nisi* be granted thereon it will be discharged. The only difficulty which has suggested itself to me is whether heading these affidavits *in re Peter Ross* is a violation of the rule,—whether it is a heading in any cause. I do not find any affidavits so headed adjudged to be irregular. But, in view of all the decisions on the subject, I am led to the conclusion that in such cases as this there should have been no heading whatever.

In *ex parte John Nohro*, 1 B. & C., 267, a rule *nisi* having been obtained for a *certiorari*, on shewing cause it was objected that the affidavits upon which the rule was obtained were entitled, "*The King v the Justices of Essex*," whereas on the motion for a rule *nisi* they ought not to have been entitled at all, as no cause was then pending before the Court. The affidavits were held to be irregular and the rule was discharged.

In *ex parte Evans*, 2 Dowl. R. N. S., 410, which was an application for a writ of prohibition, it was urged that it was the universal practice in such cases simply to entitle the affidavit in the Queen's Bench for until the writ was granted, there was no cause which could be described by the name of the parties or by any descriptive title. The Court discharged the rule.

In the case of *In re Grantham*, Gent, one of the attorneys, &c. where a rule *nisi* was taken calling on Grantham, an attorney of the Court, to answer matters in an affidavit, it was objected that the affidavits in answer could not be read as they had no title, whereas the rule *nisi* was entitled, "In the matter of, &c." The affidavits in support of the rule were not entitled at all. The Court held that the affidavits could not be read, as they should have been entitled in the same way as the rule which they were produced to oppose. The learned Judge, (PATTERSON,) after so deciding, went on to remark that the affidavits on which the rule was obtained need not be entitled at all; but he was not prepared to say that if they had been entitled in the manner in which the rule was entitled it would have done any harm.

The case of one of the attorneys of the Court is in itself somewhat exceptional, and in his last remark the learned Judge has

expressed no decided opinion, and it was an *obiter dictum*, as that question was not before the Court.

In *ex parte Walworth*, 4 D. & L., 403, the affidavits in support of a rule for a certiorari were entitled, "*In the matter of the Queen v. Robert Walworth and James Walworth*;"—objection that they were wrongly entitled. It was answered that the affidavit was only "In the matter of," which prevented any mistake being made as to there being such a prosecution pending in the Court. "PATTERSON, J.; In *ex parte Nohro*, the Court seemed to think that the affidavit might not be entitled at all. I think it is better that we should not have any nice distinctions upon the subject and enforce the general rule requiring that the affidavits in such cases should have no title at all."

The American Courts have followed the English practice in this respect. In *Haight v. Turner*, 21 John., R., 371, *per Curiam*;—"It is a settled rule of practice in the English Courts that on a motion for an information, &c., the affidavit must not be entitled; and if it is, it cannot be read. The reason assigned is, that there is at the time no cause pending in the Court, and an indictment for perjury in making such an affidavit must fail, as it cannot be shown that such a cause existed in the Court in which the affidavit is made. As the affidavits ought not to have been entitled, they cannot be read, and the motion must be denied, though on the merits the Court would have sustained the motion." I think, on the same ground, and on that ground alone, that the rule *nisi* taken out in this case should be discharged, but without costs.

THE QUEEN v. HUMPHREY.

The declaration set out a bond to Her Majesty conditioned for the due performance by defendant of his duties as guardian of the estate of a lunatic. Defendant pleaded an equitable plea, and asked for the equitable interference of the Court. A verdict having been found for defendant, and a rule taken to set it aside, the Court held that before proceeding to give judgment as to whether there should be a new trial or not, the name of some person should be introduced as relator, to be responsible for costs, and gave leave to the Attorney General to amend the proceedings accordingly.

The declaration in this case set out a bond made by the defendant to Her Majesty the Queen conditioned for the due

discharge by the defendant of his duties as guardian of a lunatic, and breach of the condition in that the defendant did not so discharge his duties, and, among other things, did not deliver over the estate after the decease of the said lunatic to the parties lawfully entitled, but retained the same in his possession. Defendant pleaded to the action, among others, a plea on equitable grounds, to the effect that the only breach committed or suffered was, that he did not within a year after his appointment render an account on oath of the property in his hands, &c.; that such condition was only intended to afford security that the defendant would diligently enquire as to the extent of the lunatic's property; that defendant did so enquire and ascertain the extent of such property and carefully guarded the same, and, long before action brought, filed an account on oath in the Supreme Court of all his transactions relating to said property, and that the omission to render an account as required by the Court, within a year after his appointment, was purely accidental and without any fraudulent intent, and had produced no injury whatever. Defendant further said that the action had been brought at the instance of a person who had no interest whatever in the estate of the deceased lunatic, and for the purpose of annoying and oppressing the defendant, and he prayed the equitable interference of the Court that he might be protected from all loss or damage in the said matter, and that such other and further order might be made as might be consistent with equity, &c. A trial was had before DESBARRES, J., in May, 1875, and a verdict found for the defendant under the charge thus reported by his Lordship:—

“I remarked to the jury as I had to the Counsel at the outset that this seemed to me an anomalous proceeding, since, though commenced by the Attorney General, the action, at the suit of the Crown and on a bond to the Crown, was not on the relation of any one interested, observing at the same time that while the breaches assigned had relation to the deceased lunatic personally, and to the mode of interment of his corpse, deceased was not represented, nor was his estate represented by any personal representative. Observing further, on the time of the filing of his account by the lunatic's guardian in relation to the time of the

commencement of the action, and on the nature and character of the action itself, I reminded the jury that we were not, under the issues, trying the correctness of that account. Pointing out to the jury that they were required by the plaintiff not merely to find the truth of the breaches assigned, but to assess damages also, that is damages to the lunatic or to her estate in respect of the breaches if so found, I read to them the conditions of the bond specified by the Legislature as necessary to be entered into in such cases by the guardian of a lunatic, and I intimated an opinion that the acts or omissions of the defendant relied on by the plaintiff were not, under all the circumstances of the case, such violations as the Legislature contemplated, nor such as involved a breach of the conditions of the bond in question. I fully stated the reasons which had brought my mind to such conclusion. The case was then left to the jury, and they found for the defendant.

The cause was argued during a previous term by *Graham* for plaintiff, and *Meagher* for defendant, on a rule *nisi* to set the verdict aside.

MCDONALD, J., now, (April 2nd, 1877,) delivered the judgment of the Court :—

The defendant in his plea on equitable grounds asks for the equitable interence of the Court, and the evidence showing that Her Majesty the Queen has no interest in the result of this suit, it is my opinion, in view of the law and the equities of the case, that before proceeding to give judgment as to whether or not there ought to be a new trial, the name of some person should be introduced as a relator in the cause, who will be responsible for the costs if eventually judgment should be given in favor of the defendant. The attorney General has leave to amend the proceedings accordingly. *Stephen's Com.* 65 and 66; *Story's Equity Pleadings*, 7.

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ABSENT OR ABSCONDING DEBTOR.

1. Process was issued against Defendant as an absent or absconding debtor, on the usual affidavit. Application to set the process aside was supported by Defendant's affidavit setting out that he had never been out of the Province but had merely gone to Annapolis and elsewhere in the Province on business. Affidavits were read in answer showing that the members of Defendant's family, one of whom had been constituted his agent, had given "unsatisfactory if not contradictory" answers to inquiries, and that the Defendant's son on one occasion had stated that his father had been in Toronto, and, he expected, was then on his way home.

Held, that the Defendant was rightly proceeded against under the Absconding Debtors' Act

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2. Plaintiff having proceeded against defendant as an absent debtor, an application was made on behalf of one Willis, claiming to be owner of the property attached, to set aside the proceedings. It appeared that defendant had two others in partnership with him in the business in connection with which the debt arose, one of whom was in the Province at the time the process was issued.

Held, that, neither defendant nor either of his partners having moved, there was no one before the Court who could be heard in support of the contention that defendant when sued was not subject to the law authorizing proceedings against absent or absconding debtors.

Affidavit made in Boston purporting to be made before BINGHAM, "Chief Justice of Superior Court," without specifying the Court, held good, where the jurat contained the words, "the seal of which Court is affixed," and the affidavit bore the seal of the proper Court.

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1. Award set aside.

Where one of two Arbitrators who had made a certain award subsequently made an affidavit setting out that he intended to decide the case according to law, but on reconsideration of the matter, and on reperusal of the minutes of evidence, he felt persuaded that in making the award he misunderstood the evidence given in the matter, inasmuch as he took for granted that no evidence was given of a certain fact, which upon the minutes of the evidence being read before the Court, by consent, appeared to be material and to be in proof.

Held, that the award must be set aside.

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2. Award sustained in part and rejected in part.

An agreement dated 19th November, 1874, was signed by A. W. and S. W. D. C., referring certain disputes concerning lands to three arbitrators named therein, providing that the award should be made and signed on or before the 19th day of February, 1875, and that copies of it should be served on the parties within ninety days of the date of the agreement. The award was made and signed on the 18th day of February, 1875, and copies of it served on that day, ninety-one days after the date of the agreement.

Held, that the objection that copies of the award had not been served within the time stipulated could not prevail, as the award was made and served within the time named in the agreement for its being made, and that, even if the objection could have prevailed in another case, S. W. D. C., who raised it here, was guilty of *laches* in allowing two terms of the Court to intervene between the serving of the award and his motion to set it aside.

Held, also, that the fact that one of the arbitrators was not present during the whole period of taking the evidence could not be made ground of objection to the award, when all the parties interested consented to the arbitrator absenting himself.

Held, also, that the portion of the award fixing fees must be set aside and the rest confirmed.

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3. Award set aside.

Rule of Court for reference, ordering *inter alia*—

1a. "That the arbitrators shall have power, &c., to examine, &c., and make an award, either separately or in one, of and concerning all accounts respecting the receipts and disbursements of moneys received from the interest, renting and sale of the glebe and church lands and the buildings thereon at Parrashoro', by the late Rev. W. B. K. or his agents, or by the defendant as his executrix, and all and every matter connected therewith or pending of and between

the said parish of St. G. and the said W. B. K., or the defendant as executrix or otherwise." Award, "that the defendant do pay to the plaintiffs the sum of one dollar in full of the same."

1b. "That the said arbitrators, &c., shall have power to order judgment to be entered in this cause either for the plaintiff or the defendant, with or without costs, or to order judgment to be entered both for plaintiff and defendant, with or without costs, as they shall find the several issues either for or against either party." Award, "that judgment be entered for the plaintiff for the sum of one dollar," and that the defendant pay all the costs of the reference and award.

2. "That the said arbitrators shall have like power, &c., to hear, &c., and make an award of and concerning the receipt and disbursement of moneys received for the sale of the school lands at Parrsboro', and rents, issues and profits of the same and every matter connected therewith, adjusting the accounts and settling the balance due thereon." Award, "that the defendant is indebted to the plaintiffs as such executrix on the said school money, in the sum of \$1400. and that said defendant do pay to the plaintiffs the said sum of \$1400. and, that judgment be entered for the plaintiffs for that amount."

Held, that the award was bad as to submission 1 a., in that it did not show on its face or by necessary implication from what appeared in it, that the several matters referred to in such submission were finally adjusted and settled.

That the award was bad as to submission 1 b., inasmuch as the arbitrators had exceeded their powers in giving costs of the reference and award.

That the award was bad as to submission 2, on the same ground that applied to the award under 1 a., and because, while it found against defendant as executrix, it directed judgment against her absolutely.

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ASSEMBLY, Constitutional Powers of House of.

Plaintiff, being a member of the House of Assembly of Nova Scotia, in a speech made on the floor of the House, and while the House was in session, charged the Provincial Secretary, also a member of the House, with having altered and falsified certain public records and grants of the Crown Land Department, after the signature of the Lieut. Governor had been appended thereto. A Committee appointed to investigate the matter reported that they found the charges altogether unfounded and that the evidence produced completely exculpated the Hon. Provincial Secretary therefrom. A resolution based upon that report was passed by vote of a majority of the House on April 28th, reciting the charge, the investigation and the report of the Committee, and concluding with an expression of the opinion of the House, that plaintiff, in preferring such charge without due preliminary investigation, had been guilty of a breach of privilege and that he should be dealt with according to the rules and practice of Parliament. Subsequently, on April 30th, a resolution was passed reciting the charge, &c., and requiring the plaintiff to appear at the Bar of the House, and with the doors open make an apology in terms dictated by the House. Plaintiff having declined to comply with the requirement, a resolution was passed

declaring his refusal to make such apology a contempt of the House and requiring him forthwith to withdraw until such apology should be made. Plaintiff having declined to withdraw, a resolution was passed to the effect that he should be removed by the Sergeant-at-Arms and kept excluded until he should signify his willingness to make the apology required by the House. The resolution was at once carried into effect, and plaintiff brought action against the Speaker, the Sergeant-at-Arms and certain members of the majority that carried the resolution.

Held, that the defendants' justification must depend solely on evidence connected with the subject referred to in the resolution, and that evidence of misconduct on the part of the plaintiff on other occasions was irrelevant, —that the House of Assembly, in passing its several resolutions, had in effect adjudicated upon an alleged contempt on the part of the plaintiff in refusing to make the apology required, and in so doing had exceeded its constitutional power, —that as there was nothing to indicate that the House had taken action on account of any unparliamentary or disorderly conduct of plaintiff calculated to interfere with the performance of its legislative duties, and as the jury had found, under the charge of the Judge, that the exacting of the apology was for a past offence, and plaintiff was excluded because he would not comply with the requirement, the verdict, which was for the plaintiff, could not be disturbed. WILKINS, J., dissenting.

The 32d Rule of the House, prescribing that in cases not otherwise provided for the House shall be guided by the rules, usages and forms of the Imperial Parliament, does not confer upon the Assembly of Nova Scotia, the power to punish for a contempt.

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—————, under Absent or Absconding Debtor process.

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—————, under Insolvent Act.

Where the Defendant, as Sheriff, levied on certain goods under executions, and a writ of attachment in bankruptcy was afterwards issued against the execution debtor, but the Sheriff, after the issue of the attachment, proceeded to sell under the execution and paid over the proceeds to the execution creditors, the Court refused to set aside a verdict against the Sheriff, at the suit of the Assignee, for improperly selling the goods, &c., and for his failure to duly execute the writ of attachment and hand over the property of the Insolvent to the Assignee.

Held, that the return to the writ of attachment did not estop the plaintiff in the present suit from saying that the same had not been duly executed.

Section 59 of the Insolvent Act, 1869, is *intra vires*.

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COMMON CARRIERS.

1. Plaintiff, a travelling agent for a mercantile firm, being about to sail from St. Pierre to Halifax in defendants' steamer, took two trunks and an ordinary packing box, with cover nailed on, all three containing samples of merchandize, to the wharf where defendants' vessel was lying, and gave his trunks and box in charge of two men belonging to the vessel, though in what capacity did not appear. He did not see the things taken on board. The two trunks were received at Halifax, but not the box.

Quære, whether there was sufficient evidence of delivery of the articles to authorized agents of the defendants.

Held, that the evidence sustained the finding of the jury that the goods (being freight) were received by defendants not as freight, but as personal luggage, and that defendants were not liable.

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2. Where the plaintiff gave evidence, uncontradicted, that defendant, the captain of a vessel, told her to send her goods to a certain wharf, and that she sent them there;

Held, that there was evidence of a constructive delivery to the defendant, which imposed on him the duty of looking after plaintiff's goods and taking them on board.

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CONSIDERATION.

1. PROMISSORY NOTES.

Plaintiff, representing himself to be the agent of owners of land which defendant had occupied, as a squatter, for twenty-six years, induced defendant to sign several promissory notes, stating that he would give defendant a deed of the land, defendant to give him a mortgage for balance of purchase money. Defendant never received the deed, nor gave the mortgage.

Held, that the plaintiff had failed to prove consideration for the notes.

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2. Defendant made a promissory note in favor of plaintiff for part of the consideration money mentioned in a deed of certain land from plaintiff and wife to defendant. Plaintiff's witness, McK., proved the making of the note, the signing and sealing of the deed by plaintiff and his wife, and the delivery of it to defendant, and testified further that it was agreed between the parties that the deed was to be left at the house of a certain Justice of the Peace for the purpose of having the plaintiff's wife examined separate and apart from her husband, as to her release of her dower, and the fact of such examination and acknowledgement of release of dower certified, and that the note was not to be recoverable until such examination and certificate were made. The wife, it appeared, refused to go before a Justice and acknowledge a release of her dower.

Held, that the delivery of the deed constituted a good consideration for the note, and that no parol evidence of an agreement to vary the terms of the note should have been received.

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3. C. made an assignment under the Insolvent Act of 1869, assigning, *inter alia*, a debt of \$100 due him by Mrs. O'B. Subsequently C. married Mrs. O'B. After the marriage C.'s assignee pressed for the settlement of the \$100 debt, and Mrs. C. (formerly Mrs. O'B.) gave the assignee a note for the amount, in which the defendant joined as surety.

Held, that the defendant was not liable on the note, as there was no consideration for Mrs. C.'s making it.

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4. FOR AGREEMENT.

Plaintiff, acting as agent for patentees, under an agreement that he was to have for his services in promoting the sale of the patented articles one-fourth of the royalties or profits, made an agreement with defendant, reciting that plaintiff had received from patentees one-fourth interest in the patents, and professing to assign one-half of that one-fourth interest in the patents to the defendant.

Held, that plaintiff, not having the interest in the patents which he professed to sell to defendant, was not entitled to recover from him the unpaid consideration money.

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1. Where the Court refused to disturb a verdict sought to be set aside on the ground that a deposition taken *de bene esse* had been removed from the files of the Court by the plaintiff's attorney, the rule *nisi* to set aside the verdict was discharged, without costs, as the plaintiff's attorney did wrong in taking the papers out of the proper custody.
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2. Where plaintiff petitioned for partition of certain land described in deeds of adjoining land made by him and another grantor to defendant, as "proposed street," claiming the land absolutely, and the Court held that he was estopped from denying that a right of way existed over it, the Court refused to allow him the costs of the argument of a rule *nisi* to set aside the verdict for defendant, although the rule was made absolute.
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—————, PRESUMPTIVE EVIDENCE OF.

Defendant bought of one B. his equity of redemption in a portion of certain land subject to a mortgage to plaintiff, and delivered to Mr. T., a solicitor, a mortgage of the same to plaintiff, to be held as an escrow until the lands should be released from the plaintiff's first mortgage. The mortgage made by defendant came into possession of plaintiff's solicitor by some means, although the condition as to the release of the land from the first mortgage to plaintiff was never fulfilled, the land having in fact been sold under foreclosure of the first mortgage. Plaintiff brought action upon the covenants in defendant's mortgage and upon the accompanying bond.

The Court was equally divided upon the question of non-suit.

YOUNG, C. J., and WILKINS, J., were for setting aside the non-suit, holding that under the above circumstances, there was such a presumption of the delivery of the mortgage and bond as to sustain the action.

MCDONALD and SMITH, JJ., contra.

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1. Plaintiff's testator, C. C., took a conveyance of land from M. P. M., paying £100 for the land, at the request of the defendants, J. L. and R. L., who had previously occupied and continued to occupy the land. Plaintiffs, having brought an action of ejectment to recover the land from the defendants, produced two witnesses, who swore that defendants had paid money to and worked for C. C., in payment of *rent*; while one of the defendants, J. L., swore that defendants never paid *rent*, but *interest*, and that they were to repay the £100 to C. C., but that no time for repayment was fixed.

Held, by the Court, acting under a rule *nisi* to set aside a verdict taken by consent, with the power of a jury to draw inferences from the facts, that the relation of landlord and tenant existed between C. C. and the defendants, J. L. and R. L., and that consequently they were estopped from disputing his title.

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2. H. McD. went on certain land as far back as 1823. In 1848 he entered into an agreement under seal with A. B. McD., attorney of G. McD., who had the legal title to the land in question, to pay for it.

H. McD. made payments under the agreement, cleared some of the land and built on it. Subsequently, in 1853, A. B. McD. took out Letters of Administration of the estate of G. McD., obtained license to sell from the Probate Court in March, 1859, and in May, 1859, sold the land in question under the license to plaintiff, who was aware of defendant's possession and of his having made payments under the agreement and improved the land.

Held, that, assuming that defendant could be treated otherwise than as a debtor to the estate for the purchase money, the plaintiff, who had brought ejectment, must show clearly that, having been lawfully in possession under an agreement to purchase, he had become a trespasser by repudiation of the purchase or breach of the agreement on his part and demand of possession, and that in the absence of such evidence the rule to set aside the nonsuit must be discharged.

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3. Defendant agreed, in 1862, to exchange land with J. L. and W. L. He deeded certain lands to them, but, instead of taking deed from

them to himself, he had the deed made out in favor of his infant son, R. F. J. This deed was recorded on the day of its execution, though the grantee, R. F. J., was not present at the execution, and there was no evidence that it was ever delivered to him personally. Defendant went into possession at once and continued in possession until action brought. R. F. J., shortly after coming of age, in 1875, executed a deed of the land to plaintiff, who, after making demand of possession, brought an action of ejectment against defendant.

Held, that the deed to R. F. J. conveyed title to him, and that the non-suit ordered on the ground that R. F. J. was out of possession when he deeded the land, defendant holding adversely, could not be sustained.

WILKINS, J., dissenting.

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4. Where a deed of real estate was prepared and executed to give title to R., but R. failed to complete the purchase, and subsequently H. & G. purchased the real estate, and by agreement between the parties, the deed to R. was recorded simultaneously with a deed from R. to H. & G.; in action of ejectment by purchaser at Sheriff's sale, under judgment recorded against R., previously to the recording of the above conveyances,

Held, that R. was a mere conduit pipe to convey title from the vendors to H. & G., and that the judgment against him did not bind the real estate in question.

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1. Mrs. M. received from plaintiffs certain articles of furniture, under the following memorandum, signed by her, "Received from Messrs. F. & Son the following articles of furniture, for which I am to pay, &c., the said furniture to remain the property of W. F. & Son, till paid for in full, and in the event of non-payment, the said W. F. & Son can take the furniture back."

The defendant, who was Mrs. M.'s landlord, before the furniture was delivered, signed the following written memorandum,—"The bearer, Mrs. M., being about to purchase some furniture from W. F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be provided by W. F. & Son, for any rent that may become due."

Held, that defendant was estopped from distraining on the furniture so supplied.

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2. The acting executor of R. H. B. and the acting executor of E. A. B., his wife, (R. H. B. having been executor of C) made a memo. as follows:—"It is mutually agreed between J. W., the acting executor of R. H. B., and myself, the acting executor of Mrs. R. H. B., "that the settlement made by him on the 18th day of December "last, at the Probate Court at Annapolis, to abide the decree then "made, by his paying over to me one hundred dollars, part of the "per-centage or commission allowed in said settlement, which sum "I have this day received."—Sgd., "J. C. T."

J. C. T., acting executor of E. A. B., had always objected to the settlement referred to in the memo.

Held, that the memo. did not estop the Judge of Probate from opening the accounts.

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1. The proviso in section 41 of cap. 96, Rev. Stat. (4th series), Of Witnesses and Evidence, applies to evidence tendered in causes where the executors or administrators have become parties by suggestion, after the death of the original party; the word "brought" in said proviso being construed with the word "evidence," immediately preceding, and not with the words, "action or other proceeding."

WILKINS, J., dissenting.

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2. The agent of a Life Insurance Company is not competent to give evidence on behalf of such Company of any statements or acknowledgements of the deceased insured in an action by his executor or administrator against such Company, under ch. 96, R. S., sec. 41.

WILKINS, J., dissenting.

O'Donnell v. Confederation Life Ins Co...... 570

_____, OF CONTINUOUS USER.

The Plaintiff claimed a right of way over land of the Defendant from a meadow lying in the rear of Defendant's land to the highway. He testified on the trial that T. Gourlay, the previous owner of his lot of land enjoyed an easement for thirty years, adversely to the party from whom the defendant derived title, but he produced no deed, and did not show that the easement, if such there was, had been conveyed to him. He also claimed, under a deed of the meadow, from the executors of T. Gourley in 1861; but as there was no evidence, except that of the plaintiff himself, of a continuous user by Gourlay for twenty years, and the evidence taken altogether negatived such a user, it was held that neither T. Gourlay nor his executors could convey any right of way to the plaintiff, and that the verdict for the defendant must be sustained.

Tupper v. Campbell..... 68

_____, OF JUDGMENT on appeal from Magistrates.

See MALICIOUS ARREST.

_____, OF OWNERSHIP of vessel.

See SHIPPING.

_____, OF REPUDIATION of agent to purchase.

See Judgment in *A. McDonald v H. McDonald et al.*..... 138

_____, OF RESIDENCE OF PARTY.

See INSOLVENT ACT OF 1869; 2.

_____, OF SEALING.

The bond contained the usual attestation clause as to signature and sealing, and Defendant had acknowledged several times that he had executed a bond to J. H., but Plaintiff's son said he did not

think the original, which he saw, was sealed. The copy from the Registry contained no indications of a seal, and the Defendant, (whose evidence on some essential points was inconsistent with that of Plaintiff's witnesses, and the proven facts of the case,) denied that he had ever delivered a sealed bond to J. H. The question as to the sealing was left to the Jury, who found "that the document in evidence was identical in purport with that signed by the Defendant, which he denied," and they found a verdict for Plaintiff.

Held, that the question was properly left to the Jury, and that the verdict should not be disturbed.

Hazell v. Dias..... 36

EVIDENCE OF THE NATURE OF PAYMENTS.

See EJECTMENT—1.

_____, RECEPTION OF.

See INSOLVENT ACT OF 1869; 2.

_____, REJECTION OF.

See Judgment in *Eaton v. Wright* 512, 513, 514

_____, SECONDARY.

1. Where the Plaintiff, the widow of J. Hazell, suing on a bond for maintenance made to her late husband and herself, testified that she had the bond in possession after her husband's death, that she gave it to her son to be recorded and had not seen it since, and the son testified that he had sent it by the magistrate to get it recorded and had not since seen it, and the document was traced to the office of the Registrar of Deeds, who testified that some one supposed to be entitled to it had got it out of his possession, and that he had searched in his office in vain for it; a paper sworn by the Registrar to be an accurate copy of the Registry was admitted as secondary evidence.

Held, that the evidence was properly received.

Hazell v. Dias..... 36

2. Where a certified copy of a deed was offered in evidence under sec. 33 of ch. 96, R. S., without an affidavit showing that the original was not in the possession, &c., of the party, but the defendant, who offered the copy, was examined as a witness at the trial, and proved that the original was not in his possession, &c.

Held, that the certified copy was properly received.

McKenzie v. Lamont..... 517

3. *Held*, (by WILKINS, J.) that, where one of the originals of an agreement between defendants, L. & F., had been in the possession of L., and no evidence was given of a search by or with L.'s Executors, or among the papers of the deceased for it, secondary evidence of the agreement had been improperly received.

Johnson et al v. Lithgow et al..... 567

See also MISDIRECTION—2.

_____, UNDER PLEA of "never indebted."

See Judgment in

Darling v. McLolland et al..... 172-3

_____, VERDICT AGAINST.

See VERDICT.

EVIDENCE, WEIGHT OF.

Where defendant, in an action of trover, pleaded accord and satisfaction, and produced in evidence a written receipt in full, which he testified plaintiff had signed, on receiving certain goods pursuant to agreement, and plaintiff testified, "I never signed such a receipt as this: It looks like my signature; I don't think it is; It is very like it: I'd say the signature was mine if I didn't see the writing above it;" and again, after hearing defendant's evidence; "He (defendant) produced a receipt similar to the one produced, which I refused to sign; I read the one I signed before doing so;"—but did not produce any witness to examine the signature, as proved by defendant, and express, if he could, a doubt as to its genuineness;

Held, that the verdict for plaintiff could not be sustained.

Montgomery v. Hart..... 533

See also VERDICT.

See also LANDLORD AND TENANT.

EXECUTION, action against Sheriff on return to.

See SHERIFF.

_____, OF BOND.

See EVIDENCE, Secondary—1.

_____, SET ASIDE.

See INSOLVENT ACT OF 1869—3.

EXECUTORS, Evidence produced against.

See EVIDENCE—1 and 2.

FELLOW-WORKMAN.

See NEGLIGENCE—2.

FILING ARTICLES.

See LAW STUDENT.

FINDING OF JURY.

See EVIDENCE of sealing.

See also LIEN for repairs.

See also VERDICT.

FOREIGN CORPORATION.

See PRACTICE—Interrogatories.

FRAUD.

One J. R., an old man, with a wife and daughter; both wholly, or nearly blind, and two infant children, being unable to support himself and family, conveyed all his property, real and personal, except a few sheep, to the plaintiffs, his son and son-in-law, on condition of their supporting himself and family. The defendant, who was at the time of the making of this assignment a creditor for a small amount, obtained a judgment and took under execution a pair of oxen included in this assignment. To plaintiff's action of trover defendant pleaded fraud, and the jury, having had the question of fraud fairly put to them at the trial, found for plaintiffs, negating fraud.

Held, that the verdict could not be disturbed.

Gidney et al v. Titus 561

FRAUDS.

See STATUTE OF FRAUDS.

FREIGHT.

See COMMON CARRIERS—1.

GAS COMPANY.

See HALIFAX GAS LIGHT CO.

GREAT SEAL, THE.

The old Great Seal of the Province—that in use since 1837—used on patents appointing Queen's Counsel and regulating precedence at the Bar in 1876, ceased to be the Great Seal of the Province on the transmission of a new Great Seal to the Lieut. Governor in December, 1869, though such new seal was not adopted or proclaimed by the Lieut. Governor in Council.

JAMES, J., dissenting. WILKINS, J., concurring, but expressing the opinion that the presence of a Great Seal on the document in question, affixed by the proper officers, raised a conclusive presumption as to its validity.

In re Precedence of Ritchie, Q. C. 450

GUARANTEE.

See INDEMNITY.

HALIFAX GAS LIGHT CO.

Plaintiff's wife was injured by an explosion of gas, caused by some defect in the gas pipe, in the room of a house rented and occupied by plaintiff. The room had previously been used as an office for a factory adjoining, and received its supply of gas from the factory. The factory had been for some time unoccupied, and the gas turned off by the Gas Company. Subsequently and shortly prior to the accident, gas was turned on again at the factory.

Held, that the Gas Company was not liable for the injury, not being liable for the condition of the gas pipes inside of any private building.

Tremaine v. Halifax Gas Light Co 394

HALIFAX liability of City of, for damage occasioned by uncovered drain.

See NEGLIGENCE—1.

———, NOTICE OF action against City of.

See NOTICE OF ACTION.

HOUSE OF ASSEMBLY, Constitutional Powers of.

See ASSEMBLY.

INDEMNITY.

Plaintiff was lessee of defendant, E. W., who, being in embarrassed circumstances, on the 29th August, 1873, assigned the rents to J. W. and A. R. W., to whom he was indebted in the sum of \$800, as security for the debt. Under the assignment plaintiff made three payments of rent to J. W., after which E. W. asserted a claim to the rents, and plaintiff paid him \$100, one month's rent, on the 1st of September, 1874, taking from E. W. and the other defendant, N. McD., a guarantee or indemnity against any claim from J. W. At this time plaintiff had a private account with J. W., who was in his debt, and on the third of the same month he permitted

J. W. to deduct from the amount due him, (plaintiff,) \$100, taking a receipt from him for a month's rent, up to the 31st of the previous month; plaintiff then sued E. W. and N. McD. on their guarantee of indemnity. On the trial plaintiff admitted that he knew the matter was in dispute when he allowed J. W. to deduct the \$100, and that he knew J. W. had said he had no claim on E. W.

Held, that plaintiff should not have allowed J. W. to deduct from plaintiff's account, a debt due, if at all, to J. W. and A. R. W., that the liability to J. W. and A. R. W. was not so satisfactorily shown as to make defendants liable, and that the non-suit directed by the Judge who tried the cause must be sustained.

Eaton v. Wright et al...... 508

INJUNCTION.

See PRACTICE.

INSOLVENT ACT OF 1869.

1. Section 59 of the Insolvent Act, 1869, is *intra vires*.
Kinney, Assignee, v. Dudman..... 19

2. Plaintiff, an assignee under the Insolvent Act of 1869, brought action to recover \$700 paid within thirty days of the assignment by one Hamilton to defendants, on a judgment entered up at the suit of the defendants shortly before the assignment but not recorded, because, as one of the defendants said, it would injure Hamilton's credit. The jury found, in answer to questions put to them, that the payment had been made within the thirty days, that Hamilton was unable to meet his engagements in full, and that defendants had probable reason for believing him to be so unable, and they found for plaintiff without specifying any sum. Objections having been taken to the verdict by rule *non*.

Held, that the description of Hamilton in the original writ in evidence, as "of Bedford in the County of Halifax," was evidence of Hamilton's residence being outside of the city, that the oral answers of defendant before a commissioner under an order of the Court were properly received against him as admissions, although the interrogatories and prior examinations were not tendered, and that the payment, although made on a judgment, was within the terms of the Act.

Cochran v. Chipman et al...... 254

3. Plaintiff recovered judgment against defendant after plea *puis darrein continuance* of composition and discharge under the Insolvent Act of 1869, the suit having been commenced before the assignment of defendant under the Act. The discharge was confirmed after plea and before trial, but did not appear to have been brought to the notice of the Court in any way at the trial. On motion to set aside execution on the judgment.

Held, that the defendant must have the advantage of the general provisions of the law in his favor, which cancelled the original indebtedness, and that the execution and proceedings thereunder must be set aside.

Wallace v. Bosson..... 419

See also PLEADINGS.

ACTS OF 1869 AND 1875.

1. *Held*, unnecessary to allege, in proceeding for a penalty under section 92 of the Insolvent Act of 1869, and section 136 of the Insolvent Act of 1875, that the defendant was insolvent within the meaning of the Act.

Harrington v. Witter..... 342

2. Under sec. 67 of the Insolvent Act of 1869, and sec. 91 of the Insolvent Act of 1875,

Held, that a clerk and two employes who had left or been dismissed from the service of an Insolvent sixteen, twenty-one and thirty-five months, respectively, before the assignment, could not be collocated on the dividend sheet by special privilege for arrears of salary and wages.

In re Estate of Mitchell, Insolvent..... 379

3. Where an insolvent had not kept an account book showing his receipts and disbursements of cash, and the Judge of the County Court granted him a discharge of the second class, suspending it for four months; on appeal, the discharge was confirmed, but suspended for an additional period of four months.

WILKINS, J., dissenting, held that sec. 101 of the Insolvent Act of 1869, made it imperative on the Court to refuse the discharge.

In re A. Mooney, Insolvent 563

INSURANCE.

Agent of Life Insurance Company not allowed to give evidence of conversations with deceased.

See EVIDENCE.

MARINE.

1. Plaintiffs agreed with McF., of St. George's Bay, Nfld., to sell him certain goods, which were shipped on board a vessel bound for that place, Plaintiffs taking a bill of lading in the usual form, but in which the goods were made deliverable to the shippers' order, one of the copies of the bill of lading being given to McF. or sent to him by the vessel. Plaintiffs insured the goods as their own property, but the Court (WILKINS and McDONALD, JJ., dissenting,) drew from the evidence the inference that both the vendors and the vendee had recognized McF. as the owner of the goods during the transit and at the time of the loss, plaintiffs having taken a note from McF.'s brother as collateral security for payment of the account, and the plaintiffs' testimony, designed to show that the goods had not been paid for or charged to McF., being considered doubtful and unsatisfactory.

Held, that, although the fact of the goods being made deliverable by the bill of lading to the order of the shippers *prima facie* indicated that they intended to reserve the right of transferring the goods, it was not conclusive; that the sale was complete when the goods were shipped according to McF.'s order, and that the plaintiffs had no insurable interest.

Pugh et al v. Wyldes et al..... 177

2. Plaintiff brought action on a policy of insurance on certain goods purchased from him by one McM., who gave his promissory notes, made payable to Plaintiff, in payment. The goods were of the invoiced value of about \$1100, and were insured for \$1400, which plaintiff explained was to cover the anticipated profits. By McM.'s directions the goods were sent to the *Cordelia* for shipment, and a bill of lading was taken stating that they were shipped by plaintiff in the *Cordelia*, bound for Margaretville, to be delivered to McM., or his assigns, he or they paying freight. Instead of being taken to Margaretville they were landed at Moser's Island, and the vessel taken a few miles out and sunk, all of which was at McM.'s instance. In his writ plaintiff set out that he and McM., or one or other of them was at the time of the loss interested in the goods, and that the insurance was made for the benefit of the person or persons so interested, and on the trial evidence was given tending to

show that no sale or delivery to McM. had actually taken place, that McM.'s purchase was a fraud on plaintiff, and that he was to have procured a second name on the notes. The Jury found these facts in answer to questions put to them, and they found a verdict for plaintiff, subject to the opinion of the Court.

Held, that plaintiff could not recover without showing that he was the owner of the goods, that the facts in proof showed an absolute sale and delivery to McM., that even if McM. had obtained the goods by false representations (i. e., as to the additional name to be procured on the notes), yet the property vested in the vendee until the plaintiff had done some act to disaffirm the transaction, and that the verdict must be set aside.

Outram v. Smith..... 187

3. Action for non-delivery of policy contracted for.

See STATUTE OF LIMITATIONS.

INTEREST.

See VERDICT.

IN LANDS.

A. McMinn was mortgagor of a lot of land. After his death the mortgage was foreclosed, and his widow, Mrs. McMinn, bought the lot in December, 1842, for £905, the sum of £725 of this amount being advanced by her daughter, Mrs. A. Kean. Several small payments were made by Mrs. McMinn to Mrs. Kean, and in 1854, on part of the land being sold, £400 were paid over out of the proceeds of the sale to Mrs. Kean, who soon afterwards agreed with Mrs. McMinn that for the balance due, some £250 or more, she would take a small house on part of the land, with a small piece of land adjoining. Mrs. Kean went into possession of the house and land agreed upon in 1854, and remained in possession until 1872, when that land and a considerable portion of the balance of Mrs. McMinn's land were taken by the Government for public purposes.

Held, that out of the appraised value of the lands, paid into Court by the Government, Mrs. A. Kean was entitled to a sum equal to the balance due her at the time of the agreement in 1854.

In re Hospital for Insane 501

INTERPLEADER.

See PRACTICE.

INTESTATE ESTATE.

See QUANTUM MERUIT.

INTOXICATING LIQUORS.

1. Enactments of the Legislature of Nova Scotia, prohibiting the retail of intoxicating liquors by unlicensed vendors and prescribing penalties for such unlicensed vending, are within the power of that Legislature by Section 92 of the B. N. A. Act, sub-section 9; and it would be no defence to an action for such penalty to show that the legislation under which the Sessions were authorized to refuse to grant licenses was *ultra vires*. The proper course in such case would be a mandamus to the Sessions to compel the granting of the license. The legislation contained in R. S., Cap. 75, sections 32 and 33, is not *ultra vires*, although it may to a certain limited extent affect trade and commerce.

Keefe v. McLennan..... 5

2. The words "every subsequent offence" in R. S., Ch. 75, Sec. 6,

and "subsequent offences" in 39 Vic. c. 1, s. 7, mean offences committed subsequently to the last previous conviction.

WILKINS, J., dissenting.

McGregor v. McArcher..... 362

3. Where a summons for selling liquor contrary to law was issued by two Justices of the Peace, and the cause tried before one of them and a Justice who had not signed the summons,
Held, that the conviction must be set aside.

Weeks v. Bonham..... 377

JUDGMENT recorded against party who serves as a conduit pipe to convey title.

See EJECTMENT—4.

JURISDICTION of Supreme Court.

Submission, "that judgment should be entered thereon with costs for the party in whose favor the award should be made."

Award (made a rule of Court under R. S., Ch. 110) containing the following findings:—

"1. That it was not justifiable for Watson Eaton to advertise doing business in the Colonial Market.

"2. That Stewart's rent should be increased one hundred dollars per annum.

"3. That Stewart should deliver up to Eaton any of Eaton's guarantees then held by Stewart.

"4. That the debts due and owing the late firm of Stewart and Eaton, amounting to \$89.94, be collected by Eaton and retained by him for his own use.

"5. That the balance due and owing by Stewart to Eaton amounts to \$16.76, which Stewart is to pay Eaton at once.

"6. That the expenses in connection with the arbitration and law expenses should be borne equally by Stewart and Eaton."

Held, that the Court could not enter judgment, as the only amount directly awarded in money to be recovered by Eaton from Stewart was \$16.76, which, being under \$20.00, was below the jurisdiction of the Court.

In re reference between Eaton and Stewart..... 392

JUROR.

The foreman of a jury which found a verdict for defendant was a cousin of defendant's wife; this fact was not known to plaintiff till after verdict, though his attorney stated to defendant's attorney before the jury announced their verdict that, if it was for defendant, it would be set aside on account of the relationship. The Judge who tried the cause was satisfied with the verdict found.

The Court refused to disturb the verdict.

LeBlanc v. McRae... 240

JUSTIFICATION, plea of.

See PLEADINGS; plea, 3, 6.

LACHES.

See ARBITRATION—2.

LAND, INTEREST IN.

See INTEREST IN LANDS.

LANDLORD AND TENANT.

Plaintiff testified that defendant "entered" his premises "as a yearly tenant at £90 a year;" and that "there never was any

agreement that he was to be a monthly tenant." Defendant testified that "the premises were engaged verbally at \$30 a month." Defendant also put in evidence two receipted accounts from plaintiff, one for "one month's rent of office, from 1st November to 1st December, 1871, \$30.00," and another for four and a quarter months' rent.

Held, that the evidence so largely preponderated in favor of defendant, in the absence of explanations by the plaintiff of these accounts, that the verdict in favor of the plaintiff must be set aside.

RITCHIE, E. J., and WILKINS, J., dissenting.

O'Neil v. Wells..... 205

See EJECTMENT—1.

See also ESTOPPEL—1.

LAW STUDENT.

The Court refused to allow a law student's articles of apprenticeship to be filed, *nunc pro tunc*, where they had not been filed at the time of their execution.

In re Application of Weeks..... 383

LIABILITY of owners of vessel for supplies.

See SHIPPING.

LIEN.

See SOVEREIGN.

—, FOR REPAIRS.

A Chronometer was left by the Plaintiff with the Defendant, a Chronometer and Watchmaker and Repairer in Halifax, with instructions, as sworn to by Defendant, to put the instrument in order. Defendant, on examining it, found that it required repairs of such a nature that he was obliged to send it to Boston to have it made right. Plaintiff refused to pay the amount charged by the Boston mechanic, and, on the Defendant's refusal to deliver up the instrument, brought an action of trover. On the trial Plaintiff stated that he had not ordered any repairs to be made beyond polishing, &c., for the price of which an ample tender, made before action, was proved. The jury found for defendant, stating that they accepted his version of the instructions given when the instrument was left with him.

Held that the Defendant had a lien for the charge made by the Boston mechanic, and was justified in refusing to deliver up the instrument until the bill was paid.

WILKINS, J., dissenting.

Webber v. Cogswell..... 47

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LUGGAGE.

See COMMON CARRIERS.

MAGISTRATES, JURISDICTION OF.

See INTOXICATING LIQUORS—3.

MALICE, express.

See SLANDER.

MALICIOUS ARREST.

On the trial of an action for malicious arrest the Judge is not required, when the evidence touching the facts upon which the question of reasonable cause depends is contradictory, to tell the jury whether or not there was reasonable or probable cause for the arrest, but directs them properly in telling them that, if they find one way on the evidence, there is reasonable cause, if they find otherwise there is not.

No record being filed in the Supreme Court of judgments in causes appealed from Magistrates' Courts, the termination of the proceedings under which the arrest was made is sufficiently proved, in support of an action for malicious arrest, by the testimony of a competent witness who heard the judgment on the appeal pronounced in open Court by the Judge.

One hundred and fifty dollars not excessive damages for arrest and detention by a constable for half an hour, where the plaintiff was put to the expense of defending a suit before a magistrate and prosecuting an appeal.

Cox v. Gunn..... 528

MANDAMUS, to compel granting of License.

Keefe v. McLennan..... 10

See also INTOXICATING LIQUORS—1.

MASTER AND SERVANT.

See under NEGLIGENCE OF SERVANT.

MESNE PROFITS.

J. H. and C. H. were tenants in common of an undivided parcel of real estate. Plaintiff bought C. H.'s interest under a judgment duly recorded against him. C. H., and his widow after his death, remained in possession of the land, and some time afterwards plaintiff brought an action for use and occupation, adding a count for mesne profits. No contract, express or implied, between plaintiff and the widow of C. H. was proved.

Held, that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits, as there had been no previous recovery in ejectment by plaintiff; and that, even if a contract had been proved to sustain use and occupation, the non-joinder of J. H. as a plaintiff was fatal to the action as brought.

LeCain v. Hosterman..... 229

MILITIA, pay for services of, in quelling riot.

See AMERCEMENT OF COUNTIES.

MINERALS.

See MINES AND MINERALS.

MINES AND MINERALS.

A license to search for minerals granted under chap. 9, R. S., 4th series, is assignable.

In re Mûner's Appeal..... 522

MINING COMPANIES, liability of for accident.

See under NEGLIGENCE—2.

MISDIRECTION.

1. Where the Judge, in charging the jury, told them that, "putting
"out of consideration all admissions that had been contradicted,
"which on that account he thought they should dismiss from con-
"sideration,, the plaintiffs were in his opinion clearly entitled to
"recover."
Held, that this was not a misdirection.
Morrison et al. v. Thompson 411
2. Plaintiffs, claiming a certain lot of land under a grant from the
Crown, passed during the last century, brought an action of tres-
pass against defendants for cutting timber on the land. At the
trial defendants produced their original grant, and tendered as evi-
dence to identify the *locus* with their lot, ancient copies of the allot-
ment book and plan of the township in which the lands lay, which
had often been received in evidence in other suits, the originals
having been lost. These copies were received by the Judge who
tried the cause, (McCULLY, J.,) without proof of a search for the
originals.
The Judge directed the jury that they had proved a documentary
title.
Held, that, under the above circumstances, there had been a mis-
direction on that point.
Church Wardens of Falmouth v. Vaughan 438
See also POSSESSION.
See also MALICIOUS ARREST.

MISTAKE OF ARBITRATOR.

See ARBITRATION—1.

MONEY PAID. recovery of, under common counts, on contract
within Statute of Frauds.

See STATUTE OF FRAUDS.

NEGLIGENCE.

1. Where plaintiff's horse was injured by falling into a deep uncov-
ered drain by the side of a road in the suburbs of the city,
Held, that, the drain being proved to be well constructed, and of
a kind (uncovered) usual in the suburbs, the City was not liable.
Mackinlay v. City of Halifax 305
2. Where plaintiff was injured by an explosion of gas in defendant
Company's mine, occasioned by an erroneous plan of the workings,
but it was not proved that the Company had employed incompetent
men to superintend the mining, and plaintiff was not employed
under any special agreement.
Held, that he could not maintain an action against the Company
for the injury.
Smith v. Intercolonial Coal Mining Co. 556

OF SERVANT.

Defendant's horses and carriage, driven by his servant westerly
along Spring Garden Road, met opposite the gate of defendant's
stable yard, situate on the northern side of the road, a horse and
truck coming in the opposite direction, and, instead of passing on
the south side, attempted to pass on the side nearest the stable yard
(the intention of the driver being to proceed to a house a few yards
west of the stables,) when the horses suddenly turned in towards
the yard, knocking down and injuring plaintiff, who was coming

along the side walk near the gate. A rule having been taken to set aside the verdict found in favor of the plaintiff for \$400,
Held, that the verdict must be sustained.

Lownds v. Robinson..... 354

NON-JOINDER of tenants in common, as plaintiffs in action for use and occupation.

See **USE AND OCCUPATION**.

NONSUIT.

See **DELIVERY**, presumptive evidence of.

NOTICE OF ACTION.

Where plaintiff, in an action against the City of Halifax for compensation for injuries received through negligence of the city's contractors, failed to give any proof of notice of action beyond a minute of the City Council, stating that a letter from plaintiff's solicitor, claiming damages, had been read before the Council, and a notice to defendants to produce the letter, not complied with.

Held, that the plaintiff could not succeed for want of sufficient notice of action under section 276 of the city charter.

Robinson v. City of Halifax..... 373

OFFENCE, under Chap. 75, R. S., of Licenses, &c.

See **INTOXICATING LIQUORS—2**.

PARTIES.

See **ABSENT OR ABSCONDING DEBTOR—2**.

PARTNERSHIP.

1. The defendants, McL. and F., entered into an agreement, whereby F. undertook to "carry on and engage in the business of an auctioneer and commission merchant in the City of H., commencing said business at and from the — day of —, and to continue the same for four years, to conduct it in such a manner, to the best of his ability, as to make it remunerative, and to pay over to the said McL. one-half of the net profits made upon all transactions." It was further stipulated that if at any time during said term the said McL. should become dissatisfied with said business, he might demand that the said F. should wind up and bring the same to a termination, that stock should be taken and the books and accounts submitted to the said McL., whenever required by him. In consideration of this, McL. agreed to advance the sum of \$500, "to be wholly put out and invested in the said trade or business," likewise "to procure to be discounted for the said F. different notes of hand at different times, being at such times as the said F. may require, in sums not to exceed \$2000." A further advance of \$40 per month was to be made by McL., to be expended in paying for the services of a man to assist in carrying on the said business. It was further stipulated that the said F. was to carry on said business "in his own name alone, and not to connect with it or use in any way whatever the name of the said McL., either in general business or in any transactions connected therewith," and further, "that the said agreement is not to be in the nature of a partnership nor for any other purposes or acts than those specified and set forth; nor is either party to be responsible for the debts contracted by the other in a business or private capacity."

Held, that the relationship thus established between McL. and F. was not that of partners nor of principal and agent, and that McL.

was not liable for goods purchased by F. in his capacity of auctioneer and commission merchant.

The Court, after ruling as above on the construction of the agreement between the parties, proceeded to say that the plaintiff could not recover against McL., as he could be made liable, if at all, only as a secret or dormant partner, and had retired before the purchase of the goods for which the action was brought.

Darling v. McLelland et al...... 164

2. Plaintiff and defendant entered into a co-partnership for five years, under a written agreement, containing a provision that, "it shall be lawful for the said E. H. (the defendant) to terminate the same at the end of the first year without any notice, if the business shall not prove satisfactory to him." Defendant terminated the co-partnership at the end of the year on the ground of the business not having proved satisfactory to him, whereupon plaintiff brought his action for non-fulfilment of the agreement, alleging that the business had proved satisfactory. The jury found for plaintiff, with large damages, and found, in answer to a question put, that the defendant, when he terminated the co-partnership, was not dissatisfied with the business.

Held, that the agreement gave an uncontrolled discretion to defendant, and that the verdict must be set aside.

WILKINS, J., dissenting.

Whitehead v. Howard..... 423

PARTITION OF LANDS.

Plaintiff and the two defendants purchased a field, divided the front portion into lots according to a certain plan, laying off two lots as proposed streets, connecting an existing street with the undivided rear portion of the land, and furnishing the only access to that rear portion from any existing street. The defendant, P., purchased the undivided rear portion and two of the front lots, one on each side of one of the proposed streets, the said lots being described in the deed as bounded on the north and south respectively by the street in question.

Held, that although the land designated on the plan as proposed streets was subject to a right of way to the rear and to any portion of the adjoining lots, yet that, as the title to it remained in the plaintiff and defendants, it was subject to partition under chapter 102 of the Revised Statutes.

Pugh v. Peters et al...... 139

PATENT.

See CONSIDERATION—4.

PAYMENT within 30 days by Insolvent under judgment.

See INSOLVENT ACT OF 1869—2.

PENALTY, under Insolvent Act.

See INSOLVENT ACTS OF 1869 AND 1875—2.

PLEADINGS.

DECLARATION.

Where plaintiff sued two out of three makers of a joint and several promissory note, alleging the making by the third, but not alleging that he was out of the jurisdiction of the Court,

Held, that this was a fatal objection to plaintiff's declaration, and

that it did not require to be pleaded in abatement, or raised by demurrer.

Russell v. Grant et al...... 409

See also Judgment in *Morrison v. Kandick*..... 149

See also CO-SURETIES.

See also INSOLVENT ACTS OF 1869 AND 1875.

PLEA.

1. The sealing and delivery of a bond are put in issue by a plea that the defendant "did not make and deliver any such bond," as that declared on.
Hazell v. Dyas..... 36
2. Plea, That defendant, after the cause of action accrued, being a trader, became insolvent within the meaning of the Insolvent Act of 1869, and made an assignment under the Act,
Held, Bad on demurrer.
McCULLY, J., dissenting.
Murray et al v. Ross..... 154
3. Pleas of justification under authority of the Crown sustained.
Wallace et al v. Ross..... 190
4. Plaintiff brought an action on the case, setting out that he had made a contract with defendants, and had been prevented by them from completing it.
Plea, that he had failed to carry out the contract, held bad on demurrer.
Plea, setting up a new agreement between the parties respecting the same subject matter before action, held good, though not averring that the new agreement was before breach of the first, and not alleging accord and satisfaction of the breach.
Gillis v. Trustees of School Section 9½..... 369
5. Defendants pleaded, 1st, "that the land is not the land of the plaintiff," and 2nd, "that the land is the land of the defendant." Plaintiffs gave no proof of possession of the land in question.
Held, that under the pleadings, there being no plea expressly denying plaintiffs' possession, the plaintiffs were relieved of the burthen of proving possession.
Church Wardens of Falmouth v. Vaughan..... 439
6. *Held*, in an action against the Sheriff for selling plaintiff's goods under a writ of attachment against the L. Mining Co., on a demurrer to defendant's plea, which set out the attachment and levy of the goods, "as and being the goods of the L. Coal Mining Co.," and the sale of the goods, "being the property of the L. Coal Mining Co.," that the plea was bad, as it did not allege that the goods were not the goods of the plaintiff.
WILKINS, J., dissenting.
Bradley v. McLean..... 584

REPLICATION.

To a declaration for carrying away and converting goods of the plaintiff, defendant pleaded justifying the taking as a distress. Plaintiff replied that the distress was excessive, and by other replications alleged in different forms that the amount of the rent had been satisfied in repairs, the cost of which defendant had agreed to deduct from the rent.

Held, on demurrer to the replications, that the replication alleging an excessive distress was a departure and therefore bad, and that the demurrer thereto must be allowed with costs;—that the other replications would be objectionable on special demurrer only, and that as respected them each party should pay his own costs.

Benjamin v. Tobin..... 64

PLEAS, setting aside.

See PRACTICE; setting aside pleas.

POSSESSION.

Defendant gave evidence that he had chopped on the *locus* ever since about 1836, at first as a trespasser, built a logging camp on it about two years later, which he occupied in winter, had one side line run out by a surveyor in 1841, built a saw-mill in 1850, which, with the adjoining yard, continued to be used for upwards of twenty years, had three lines run out by a surveyor in 1852, one of these lines being that run out in 1841. Evidence was also given of three parties having gone upon and cultivated portions of the land under defendant, within twenty years, but two of their clearings had been abandoned before action.

Held, that, in the absence of any documentary title, defendant had not proved possession to give him title under the Statute of Limitations to any portion of the land except the mill site and mill yard, and that, as the alleged trespasses were committed on other portions of the land, the verdict for plaintiffs must stand.

Churchwardens of Falmouth v. Vaughan..... 438

See also INTEREST IN LANDS.

PROOF OF.

See PLEADINGS; plea 5.

Churchwardens of Falmouth v. Vaughan..... 439

UNDER agreement to purchase.

See EJECTMENT—2.

PRACTICE.

AFFIDAVIT.

Affidavit made in Boston purporting to be made before BINGHAM, "Chief Justice of Superior Court," without specifying the Court, held good, where the jurat contained the words, "the seal of which Court is affixed," and the affidavit bore the seal of the proper Court.

Robertson v. Cameron..... 261

AMENDMENT AFTER VERDICT.

M. sued L. and F. as joint contractors. L. died and his executors were substituted on the record. M. died and his executors were substituted. At the trial it appeared that J. had been a partner and co-contractor with M., and his name was added. The writ was amended by adding J.'s name, and the cause went to trial as *Executors of M., and J. v. Executors of L., and F.*, and the jury found a verdict for \$651 in favor of J., as surviving partner of M.

Held, that after verdict the Court could not amend the writ by expunging the names of the executors of M., and adding to the name of J. the words, "as surviving partner of M."

Johnson et al. v. Lithgow et al...... 567

AMENDMENT OF DECLARATION.

See DEMURRER, *infra*.

AMENDMENT OF RULE for appeal allowed.

See argument in *McLaren v. McNeil*..... 162

APPEAL.

1. The time within which an appeal must be taken from a decision of the Equity Court, under R. S., cap. 95, sec. 75, runs from

the day on which the decision is pronounced; and where a decision was pronounced on July 5th, 1875, but the decree, bearing date March 27th, 1876, was enrolled April 3rd, 1876, an appeal taken out on the last mentioned date was held too late.

Burton, Adm'r, v. Burns..... 349

2. Where judgment is for defendant, and plaintiff, appealing, wishes to stay execution for defendant's costs, he must give security for \$750, or \$250 in addition to the \$500 prescribed by "the Supreme and Exchequer Courts Act."

Kinney (Assignee) v. Dudman..... 376

ATTACHMENT FOR CONTEMPT.

A rule for attachment for a contempt of Court committed during an adjourned term, (adjourned under R. S., c. 94, sec. 11.) can be moved for on the last day of such term; and it is no objection to the rule that it is made returnable to the next term. A rule *nisi* for an attachment can be moved for on the last day of Term for a contempt committed during the Term. But the rule will be discharged if headed "In re, &c.," when there is no such matter depending in Court.

In re Peter Ross..... 596

COUNTY COURT, power of under Interpleader Act.

See INTERPLEADER.

DEMURRER.

1. Where defendant demurred to plaintiff's replication and plaintiff moved to strike the cause off the docket, on the ground that defendant had not filed the demurrer book at Halifax on the Tuesday preceding the term, the Court refused to strike off the cause, holding that the carriage of the demurrer was with the plaintiff, who had a right to say whether he would bring on the demurrer or the pleas first.

Benjamin v. Tobin 64

2. Plaintiff set out in his writ that he had recovered judgment against defendant as administrator and that, to the execution thereon, the Sheriff had returned that defendant had no goods or chattels which were, &c., but had paid the costs of the suit, (the return being set out *verbatim*.) and the declaration proceeded, "whereby it appears that the defendant had eligned, wasted and converted to his own use the goods," &c. Defendant demurred on the grounds, that no *devastavit* was alleged or suggested; that while it was alleged to appear by the return that defendant had eligned and wasted the goods of the intestate, the return, which was set out *verbatim*, did not allege or suggest a *devastavit*; that it did not follow as a legal inference from the return that defendant had been guilty of a *devastavit*, and further that the *devastavit* should be alleged as a fact and not stated as an inference.

Held, that the rule *nisi* to set aside the demurrer as irregular must be made absolute, and that defendant, if embarrassed by the declaration, should have applied under R. S., cap. 94, sec. 124, to have it amended, and was precluded by the statute from demurring except after non-compliance by plaintiff with a judge's order to amend.

RITCHIE, E. J., dissenting.

Morrison v. Kandick..... 148

DEPOSITION taken *de bene esse*.

Where Plaintiff's Attorney had taken from the files of the Court a deposition taken *de bene esse*, but the Defendant, wishing to use it, did not succeed at the trial in proving the illness or absence

from the Province of the witness with sufficient clearness to have the deposition read, if procured,

Held, that the fact of the deposition having been removed from the files of the Court did not constitute sufficient ground for disturbing a verdict in favor of Plaintiff.

McDonald et al. v. Merchants' Marine Insurance Company..... 133

DISCHARGING rule *nisi*.

Where no one appears in support of a rule *nisi* for a new trial, when the cause is called for argument, the rule *nisi* will be discharged after reasonable time for the party who took it out to make such application as the circumstances call for.

O'Connor v. Royal Canadian Insurance Co...... 373

ENLARGEMENT of rule *nisi*.

On the day when an order *nisi* to set aside pleas was returnable at Halifax, the defendant residing at New Glasgow, his Counsel moved at Chambers for an enlargement of the rule, on his own affidavit, setting out that the law firm of which he was a member had been informed by the attorney of the defendant that they would receive by the mail of the previous evening an affidavit showing cause against the rule, but that no such affidavit had been received. It was not shown that inquiries had been made at the Post Office, at Halifax, for the letter said to contain the affidavit, or that in fact it had ever been mailed at New Glasgow.

Held, That the decision of the Judge at Chambers, refusing to enlarge the rule, should be sustained.

McLaren v. McNeil..... 161

EXTENDING RULE after it has expired,

See Gisborne v. Cape Breton Co...... 374

FILING ARTICLES.

See LAW STUDENT.

IDENTIFICATION of exhibits.

Where a deed was referred to during the argument before the full Bench of a rule *nisi* for a new trial, and was objected to on the ground that it did not bear the initials of the Judge who tried the cause at *Nisi Prius*, but the minutes described the deed and mentioned it as being tendered and read, the Court decided that the identification was sufficient.

Tupper v. Campbell..... 70

INJUNCTION.

Where an injunction from the Equity Court was outstanding, restraining the plaintiffs from proceeding in their common-law suit, the Court refused to extend a submission in the common-law suit, the extension being applied for to enable the parties to proceed with the reference whenever the injunction should be removed.

Gisborne v. Cape Breton Co...... 374

INTERPLEADER.

The County Court has power to grant relief under the sections of the Practice Act "of interpleader."

Cooper v. Mylne..... 382

INTERROGATORIES.

The Court will order a defendant corporation doing business in Nova Scotia, though incorporated abroad, to answer interrogatories, under ch. 96, R. S.

The officers of such Company can be interrogated, though not mentioned by name in the commission to interrogate.

Hart et al. v. Western Union Telegraph Co...... 535

JUDGMENT.

1. The date of pronouncing decision of Court is held to be the date of judgment in cases of appeal to the Privy Council.
Burton, Adm'r. v. Burns..... 349
2. It is not necessary to move the Court for leave to enter judgment under R. S., ch. 94, sec. 111, where plaintiff has failed to give security for costs within twelve months after service of a rule therefor.
Gray v. McKeen. Nelson v. Fulton..... 402

RELATOR.

The declaration set out a bond to Her Majesty conditioned for the due performance by defendant of his duties as guardian of the estate of a lunatic. Defendant pleaded an equitable plea, and asked for the equitable interference of the Court. A verdict having been found for defendant, and a rule taken to set it aside, the Court held that before proceeding to give judgment as to whether there should be a new trial or not, the name of some person should be introduced as relator, to be responsible for costs, and gave leave to the Attorney General to amend the proceedings accordingly.
The Queen v. Humphrey..... 600

SECOND TRIAL OF PRISONERS UNDER INDICTMENT.

Where, on the trial of prisoners indicted for breaking and entering a bank, the jury disagreed, and there was no time left for a second trial during the then Sittings of the Court,

Held, that a trial could be obtained by the issue of a Commission by the Government, and that the Court could not order a new trial of the cause or discharge the prisoners on their own recognizances.
The Queen v. Watson et al...... 1

SECURITY FOR COSTS, rule for.

The power granted by Chapter 94 of the Revised Statutes to Prothonotaries, to give orders for security for costs, for better particulars, and for further time to plead, is limited to the Prothonotary of County where the writ is returnable.

Cummings v. Brown..... 303

SETTING ASIDE PLEAS.

Allegation in defendant's affidavit that "the pleas are not false, frivolous and vexatious, and are not pleaded solely or principally for delay,"

Held, of no effect in opposing motion to set aside pleas under R. S., ch. 94, sec. 133,

Quere, whether that or the contrary allegation in plaintiff's affidavit on such motions is necessary.

Ford v. Brown..... 403

SUBMISSION, refusal to extend.

See INJUNCTION, *supra*.

VENUE, change of.

1. On appeal from the decision of the Judge at Chambers changing the venue from Halifax to Cumberland, where the statements of the Defendant as to the convenience of trying the cause were in their essential features unanswered, and it was not shown that the Judge had misconceived the facts of the case, the Court refused to interfere with his discretion, and, although Plaintiff's agent swore to the existence of a hostile feeling in Cumberland which would defeat the Plaintiff's claim, the Court would not presume that an impartial trial could not be had there in a matter having no general or political importance.

Botch v. Flinn..... 27

2. Change of *venue* refused, preponderance of convenience being proved, by plaintiff's affidavit, to be largely in favor of *venue* as laid.

The Judge before whom the application for a change of *venue* was made, having discharged it, directing the plaintiff, in accordance with an offer in plaintiff's affidavit, to enter into a rule to make certain admissions of technical but necessary matter,

Held, that this condition imposed upon plaintiff was not a ground for appeal by defendants.

Woodworth v. Blackadar et al...... 309

3. Where defendant, appealing from a Judge's order at Chambers, discharging an order *nisi* to change *venue* from Halifax to Baddeck, alleged that he required five witnesses residing at Baddeck, and that it would cost him \$120 more to try the cause in Halifax than it would at Baddeck, and plaintiff alleged that the attorneys and counsel on both sides resided in Halifax, that he had two witnesses who could more easily be taken to Halifax than to Baddeck, and that it would cost him \$78 more to try the cause in Baddeck than in Halifax;

The Court dismissed the appeal without costs, directing that the testimony of defendant's witnesses be taken *de bene esse*, and received in evidence at the trial in Halifax.

King v. Trustees of School Section of Baddeck...... 515

PRECEDENCE AT THE BAR.

Chapters 20 and 21 of the N. S. Acts of 1874, respecting the appointment of Queen's Counsel and the regulation of precedence at the Bar of N. S. by the Lieut. Governor of the Province in Council, are *intra vires*, but the latter is not to be construed as retrospective in its effect. JAMES, J., dissenting as to the latter act not being retrospective.

In re Precedence of Ritchie, Q. C...... 450

PREFERENTIAL CLAIMS.

See INSOLVENT ACTS OF 1869 AND 1875.

PRESUMPTIVE EVIDENCE of delivery.

See DELIVERY.

————— OF OWNERSHIP of vessel.

See SHIPPING.

PRINCIPAL AND AGENT.

See PARTNERSHIP—1.

See also SET OFF.

PRIVILEGED COMMUNICATION.

See SLANDER.

PROMISSORY NOTES.

A written promise, signed in Nova Scotia, to pay a certain sum of money in Boston, in United States currency, is a promissory note.

Souther et al. v. Wallace...... 548

CANCELLATION OF STAMPS.

See STAMPS.

PROMISSORY NOTES.

CONSIDERATION.

See CONSIDERATION.

DECLARATION on joint and several.

See PLEADINGS.

DOUBLE STAMPING.

See STAMPS.

ILLEGAL STAMPING.

See STAMPS.

PROTHONOTARIES, powers of.

See PRACTICE—Security for costs.

PUBLIC INSTRUCTION.

See TRUSTEES OF SCHOOLS.

QUANTUM MERUIT.

H. K. died at a very advanced age, having been faithfully and kindly attended to during the last three years of his life by his son, J. K., and his son's wife. He had promised in consideration of this attention and care to devise one of his houses to a son of J. K., but died intestate. No bargain appeared to have been made between H. K. and J. K. as to the reward J. K. and his wife were to receive for taking care of him.

Held, that J. K. was entitled to receive reasonable compensation for the services rendered, out of H. K.'s estate, which was considerable. J. K. had lived in one of H. K.'s houses during the time he took care of the old man, without paying rent, and the Court allowed him \$600, on appeal from the Probate Court, which had allowed him \$360, and ordered the costs of the investigation and appeal to be paid out of the estate.

In re Estate of H. Kennedy..... 539

QUEEN, THE.

See SOVEREIGN, THE.

QUEEN'S COUNSEL.

See PRECEDENCE AT THE BAR.

RECALLING WITNESS.

See WITNESS.

RECEIPT.

See EVIDENCE, weight of.

RECEIPTS, weight of, as evidence.

See Judgment in *O'Neill v. Wells*..... 205

RECEPTION OF EVIDENCE.

See EVIDENCE.

REGISTRY OF DEEDS.

Where a certificate of the attestation of the execution of a deed contained no date,

Held, that the deed was properly recorded in the Registry of Deeds office, the words of the 12th sec. of ch. 77, R. S., requiring the date of the attestation, being merely directory.

McKenzie v. Lamont..... 517

REGISTRY OF VESSEL, certificate of.

See SHIPPING.

RELATIONSHIP OF JUROR.

See JUROR.

RELATOR.

See PRACTICE—Relator.

REMITTING PORTIONS OF VERDICT.

See SET OFF.

REPLEVIN.

See SOVEREIGN, THE.

REPLICATION.

See PLEADINGS.

REPUDIATION of agreement to purchase.

See EJECTMENT—2.

RETURN to Writ by Sheriff, whether estoppel.

See ATTACHMENT.

See also SHERIFF, action against—1.

RIGHT OF WAY.

Plaintiff and the two defendants purchased a field, divided the front portion into lots according to a certain plan, laying off two lots as proposed streets, connecting an existing street with the undivided rear portion of the land, and furnishing the only access to that rear portion from any existing street. The defendant, P., purchased the undivided rear portion and two of the front lots, one on each side of one of the proposed streets, the said lots being described in the deed as bounded on the north and south respectively by the street in question.

Held, that the plaintiff was estopped, as a grantor in the deed to defendant, P., from denying that a right-of-way was granted over the land designated in the deed and on the plan under which the sales were made as proposed streets.

Pugh v. Peters et al...... 39

See also EVIDENCE, of continuous user.

RIOT, pay for services of militia in quelling.

See AMERCEMENT OF COUNTIES.

RULE *NISI* discharged.

See PRACTICE ; discharging rule *nisi*.

————— FOR ATTACHMENT.

See PRACTICE—Attachment.

RULES of the House of Assembly.

See ASSEMBLY.

SALE.

See INSURANCE, Marine.

——— CONDITIONAL.

See Judgment in *Fraser et al. v. Wallace*..... 339

——— OF ALLEGED interest in patents.

See CONSIDERATION—4.

SCHOOLS, TRUSTEES OF.

See TRUSTEES OF SCHOOLS.

SEAL, of Incorporated Company.

Plaintiff purchased all the personal property of the L. Coal Mining Co'y., after the Company had become hopelessly insolvent, receiving a bill of sale signed by the agent of the Company, but not sealed with the corporate seal, proved to have been possessed by the Company. He took possession of the goods at the time of the sale and remained in possession until the cause of action indicated below arose.

Held, in an action against a Sheriff for subsequently selling the goods under an order of the Supreme Court, following a levy under a writ of attachment against the L. Coal Mining Co'y., that under the provisions of Chapter 53, R. S., Section 15, the use of the corporate seal upon the bill of sale was not necessary.

WILKINS, J., dissenting.

Bradley v. McLean..... 584

——— THE GREAT.

See GREAT SEAL, THE.

SECONDARY EVIDENCE.

See EVIDENCE.

SECOND TRIAL of Prisoner under indictment.

See PRACTICE; Second trial.

SECRET PARTNER.

See PARTNERSHIP.

SECURITY FOR COSTS.

See PRACTICE; Security, &c.

——— WHERE execution stayed.

See PRACTICE, Appeal, 2.

——— JUDGMENT in default of.

See PRACTICE, Judgment, 2.

SERVANT, negligence of.

See NEGLIGENCE.

SET OFF of agent's debt in action of principal.

Defendant bought goods belonging to plaintiffs from A. B. A., their agent, A. B. A. being indebted to defendant at the time; de-

defendant, testified that A. B. A. did not disclose at the time of sale that the goods were not his own; A. B. A. and his book-keeper testified that the principals were disclosed at the time the goods were ordered, and produced a memorandum headed with plaintiffs' name, containing the order signed by defendant, but declined to produce their books. Defendant denied that plaintiffs' name was on the memorandum, when signed by him. The jury found for defendant for \$75, the excess of his offset. The \$75 was subsequently remitted by defendant.

Held, that the verdict could not be disturbed.

Bowmanville Machine Co. v. Dempster..... 273

SHERIFF, action against.

1. Where the Defendant, as Sheriff, levied on certain goods under executions, and a writ of attachment in bankruptcy was afterwards issued against the execution debtor, but the Sheriff, after the issue of the attachment, proceeded to sell under the executions and paid over the proceeds to the execution creditors, the Court refused to set aside a verdict against the Sheriff, at the suit of the Assignee, for improperly selling the goods, &c., and for his failure to duly execute the writ of attachment and hand over the property of the Insolvent to the Assignee.

Held, That the return to the writ of attachment did not estop the Plaintiff in the present suit from saying that the same had not been duly executed.

Held, also, That a verdict for the net proceeds of the sale, with 12 per cent. added, was not excessive, the evidence justifying the finding of the Jury that the goods would have brought that amount if properly sold.

Kinney, Assignee, v. Dudman..... 19

2. Plaintiff, having recovered judgment against his debtor, placed an execution in the Sheriff's hands, with instructions endorsed, to levy on the goods of the debtor, and for want thereof to take his body. The Sheriff returned "no goods," but did not take the body. The residence of the judgment debtor was within the bailiwick, and there was nothing to show whether he was or was not actually in the bailiwick while the execution was in the Sheriff's hands.

Held, that the plaintiff's verdict in an action against the Sheriff, taken by consent for nominal damages, must stand.

WILKINS, J., dissenting.

Thorpe v. McLean..... 200

SHIPPING.

Where the managing owner and the master of a ship order necessities for the navigation of the ship on credit, the owners are liable. The Certificate of registry is presumptive evidence of the ownership. (See R. S., Chap. 96, sec. 103.)

Smith v. Fulton et al...... 225

SLANDER.

Plaintiff was the Collector of Pew Rents in St. Paul's Church, and it was his duty as such to hand them over to the Defendant, who was the Senior Warden. The Church had been broken open, and the money and money boxes with certain books of no use to any one but the Plaintiff and the Church, taken away. The Defendant in presence of the Plaintiff's surety, (a Vestryman), two other Vestrymen and the Rector of the Church, charged Plaintiff with the crime, adding that he had not handed over the money collected and had destroyed the books to cover the deficiency. The Jury, in answer to a question, said they could not decide whether the Defen-

dant had malice or not when the words were spoken, but that they considered he had no right to use them, and they found for the Plaintiff.

Held, that the communication was privileged, and that as the Jury had not found express malice the verdict must fall.

Shepherd v. White..... 31

SOVEREIGN, THE.

The goods of the Sovereign cannot be detained under a claim of lien.

A defendant cannot plead double or several matters in the case of the Crown.

The Queen can bring replevin under R. S., ch. 94, sec. 329.

The Queen v. Fraser..... 431

STAMPS.

1. *Held*, that, although there was no plea of insufficient or illegal stamping, yet, as evidence of illegal stamping had been received at the trial without objection, the question of the legality of the stamping was for the consideration of the Court.

Held, also, the notes not being originally legally stamped, that the plaintiff, as he became holder, if at all, at the time of the making of the notes, and was therefore cognizant of the circumstances surrounding their execution, could not validate them by double stamping, under act of 1870, cap. 13, sub-section 12.

Waters v. McCulloch..... 74

2. After a promissory note has been read in evidence it is too late to object to the insufficiency of the stamps.

Souther et al. v. Wallace..... 548

3. The payees of a note not legally stamped at the time of making it could not cure the defect by subsequent double stamping, under sec. 12 of chap. 13 of the Dominion Acts of 1870.

Essex et al. v. Campbell..... 577

— — — CANCELLATION of.

Where three stamps were affixed to a note, the three making up the amount of stamp duty payable upon it, and the figures "5—16—73," corresponding with the date of the note, were written across the three stamps, (which were affixed one above another, the middle overlapping the lower one), so that a small portion of the figure "5" and nothing more, could be discerned upon the lower stamp.

Held, that the stamps were sufficiently cancelled.

Murdoch v. De Wolf et al...... 280

STATUTE OF FRAUDS, Contract within.

Plaintiff, who had purchased defendant's stock in trade and leased his premises at S., gave defendant his note for \$200, in consideration that defendant would sell the good will of his business to plaintiff, and would not interfere with him for the term of five years. The agreement was not in writing. Defendant, within the period of five years, returned to S., and set up business there, so as to interfere with plaintiff.

Held, that, while plaintiff could not recover for breach of this agreement, not being in writing, and not to be performed within one year, he could recover under the common count for money paid, and that his verdict for \$200 must be sustained.

Meek v. Gass..... 243

LIMITATIONS.

Plaintiffs insured a vessel in the office of defendants on October 28th, 1865, by means of the usual application slip, leaving the broker to fill up the policy in the usual way. On the 31st October the Directors of defendants' Company made an entry in their record book in the following words, "Not allowed under the policy to proceed to any port in South Greenland," which they inserted in plaintiffs' policy. The policy was not delivered to plaintiffs till the 1st of June, 1866. The first intimation plaintiffs had of this new condition was a notice served upon them on the 12th June, 1866, after the vessel had sailed to a port in South Greenland. The vessel was lost on the 12th August, 1866, and proof of loss exhibited on the 22nd Sept., 1866. Plaintiffs brought action on the policy on the 20th September, 1872, with added counts for the non-delivery of a policy in accordance with the original contract. Defendants pleaded the Statute of Limitations to these added counts.

Held, that, as the action for breach of contract would have lain if brought after the delivery of the policy in June, 1866, and before the loss, it was barred by the Statute.

Robertson et al. v. Lovett et al. 250

STAY OF PROCEEDINGS.

See PRACTICE—Appeal, 2.

SUBSEQUENT OFFENCE.

See INTOXICATING LIQUORS—2.

SUBSTITUTED AGREEMENT pleaded.

See PLEADINGS; plea, 4.

TENANTS IN COMMON must be joined as plaintiffs, in action for use and occupation.

See LeCain v. Hosterman 229

TITLE.

See EJECTMENT.

TRESPASS TO LANDS.

See TRUSTEES OF SCHOOLS.

TRUSTEES OF SCHOOLS.

Two of the defendants and another were duly elected school trustees in October, 1873. In December the defendants, without the concurrence of the third trustee, removed the school house from its then site. No school was maintained during the winter, though efforts were made by the trustees to maintain one. In June, 1874, the Commissioners of Schools for the district including section 16 dismissed the three trustees and appointed three others, assuming the power to do so under Chap. 32, R. S., sec. 20. The newly appointed trustees brought action of trespass against the two trustees who had removed the school house and their servants for such removal.

Held, that, under the circumstances, the Commissioners had no right to dismiss the original trustees and appoint others, and that even if their appointees had been legally appointed trustees, no action would lie at their suit against defendants for acts committed during their term of office.

Trustees of School Section 16 v. Cameron 328

TRUSTS.

See INTEREST IN LANDS.

ULTRA VIRES, Chap. 75, R. S., not.*See* INTOXICATING LIQUORS—1.*See also* PRECEDENCE AT THE BAR.

USE AND OCCUPATION.

J. H. and C. H. were tenants in common of an undivided parcel of real estate. Plaintiff bought C. H.'s interest under a judgment duly recorded against him. C. H., and his widow after his death, remained in possession of the land, and some time afterwards plaintiff brought an action for use and occupation, adding a count for mesne profits. No contract, express or implied, between plaintiff and the widow of C. H. was proved.

Held, that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits, as there had been no previous recovery in ejectment by plaintiff; and that, even if a contract had been proved to sustain use and occupation, the non-joinder of J. H. as a plaintiff was fatal to the action as brought.

LeCain v. Hosterman..... 229

USER, Continuous.

See EVIDENCE of Continuous User.

VENUE, Change of.

See PRACTICE—Venue.

VERDICT.

1. Plaintiffs claimed title to a certain lot of hay cut by them under an agreement entered into by them with one McK., dated 18th June, 1867. No evidence was given of McK.'s right to sell the grass or hay other than the presumption arising from his having long been and then being in occupation of the land. Defendant produced an agreement, dated 8th June, 1866, with McK., reciting that McK. and his wife had that day conveyed to defendant the land on which the grass grew, and gave evidence of having received a deed of the same bearing the same date, but did not produce any deed, and also gave evidence, uncontradicted, that he was put in possession on the 9th June, 1866, by McK., and that from that time onward McK. was acting as his servant.

Held, that the verdict for plaintiff must be set aside.

WILKINS and SMITH, JJ., dissenting.

McDonald et al. v. Brodie..... 215

2. In an action for trespass to land, the defendant proved the establishment of a conventional line with the person from whom plaintiff claimed, giving the *locus* in question to defendant. Plaintiff and defendant both proved subsequent acts, indicating ownership, performed by them respectively, on the *locus*. To the question, "if S. G., when proprietor of the land of plaintiff, had met C. G. and the defendant on the land in question, and agreed with them as trustees of the A. Church property, that the western side of the stone wall should be the western line of the land known as the A. Church property," the jury returned this answer, "he (S. G.) said so," and found a verdict for plaintiff. S. G. did say so in his testimony at the trial and was not contradicted.

Held, that the verdict must be set aside.

Garhatt v. Gooseley..... 235

3. Court can alter verdict in order to give it its legal effect.

See Judgment in *Cochran v. Chipman et al.*..... 254

4. A verdict for plaintiff for \$2670, "with interest," is a verdict on which judgment may be entered up, though the note on which the action was brought, payable in Boston, U. S., specified no rate of interest,—the rate of interest at the place of payment, at the time of the trial, to be ascertained by a Master of the Court.
Souther et al. v. Wallace..... 548

See also FRAUD.

See also JUROR.

WASTE.

The extent to which wood may be cut by a widow or any one claiming under her, on wild lands assigned to her by way of dower, before the party is guilty of waste, must be left to the discretion of the jury under the direction of the Court.

Defendant, under the authority of the tenant in dower, cut down hardwood in a field of eight or ten acres, which he fenced and cultivated, rendering it more valuable than in its original state, and also cut a valuable knoll and other trees outside the field for sale, having paid the tenant in dower \$90 for the privilege of doing so. For the former the jury acquitted him; for the latter they awarded \$50 damages. Verdict sustained.

Titus et al v. Haines..... 542

WILL.

Where testator devised certain real estate specifically, and also made specific pecuniary bequests to several persons,

Held, (affirming in *re Estate of McKay*, 1 Oldright, 131,) that the real estate so devised could not be sold to contribute towards the pecuniary bequests, and that each party should pay his own costs, as neither party appeared to have brought the case reported by *Oldright* to the notice of the Court below.

In re Stephen Piers' Will..... 358

WITNESS, recalling.

The defendant's counsel desired, at the close of plaintiff's case, to recall the witness, *McK.*, to examine him as to what he meant when he spoke of the delivery of the deed, having already had the opportunity of cross-examining him upon the point. The Judge who tried the cause declined to allow the witness to be recalled for that purpose.

Held, that it was a matter within the discretion of the Judge, and that he had exercised the discretion wisely.

Graham v. Graham..... 265

YEARLY TENANCY.

See LANDLORD AND TENANT.

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